Supreme Court
FILED

01-332 AUG 24 2001

No. ___

OFFICE OF THE CLERK

IN THE

Supreme Court of the United States

BOARD OF EDUCATION OF INDEPENDENT SCHOOL DISTRICT NO. 92 OF POTTAWATOMIE COUNTY AND INDEPENDENT SCHOOL DISTRICT NO. 92 OF POTTAWATOMIE COUNTY,
Petitioners,

v.

LINDSEY EARLS and LACEY EARLS, minors, by their next friends and parents, John David and Lori Earls, and DANIEL JAMES, a minor, by his next friend and mother, Leta Hagar,
Respondents.

On Petition for a Writ of Certiorari to the United States Court of Appeals for the Tenth Circuit

---

PETITION FOR A WRIT OF CERTIORARI

LINDA MARIA MEOLI *
STEPHANIE J. MATHER
WILLIAM P. BLEAKLEY
THE CENTER FOR EDUCATION LAW, INC.
809 N.W. 36th Street
Oklahoma City, OK 73118
(405) 528-2800

* Counsel of Record

Attorneys for Petitioners

August 2001

WILSON-EPES PRINTING CO., INC. – (202) 789-0096 – WASHINGTON, D. C. 20001

116 pp

QUESTION PRESENTED

Boards of education throughout the country consider the suspicionless drug-testing of students to be an effective and essential deterrence to drug use and a means to provide treatment to student drug users. Since this Court's decision in *Vernonia School District 47J v. Acton*, 515 U.S. 646 (1995) ("*Vernonia*"), our nation's boards of education have grappled with courts' varying interpretations of the requirements of the Fourth Amendment regarding their authority to test students for drug use. A clear conflict now exists among the circuit courts on the extent of that authority.

The question presented is whether the Tenth Circuit Court of Appeals properly determined that a board of education cannot validly exercise its judgment in an effort to deter and eliminate student drug use by enacting a suspicionless drug-testing policy covering students who voluntarily engage in interscholastic competition unless the board has first specifically identified and quantified the actual drug users among the students to be tested.

TABLE OF CONTENTS

	Page
QUESTION PRESENTED	i
TABLE OF CITED AUTHORITIES	v
OPINIONS BELOW	1
STATEMENT OF JURISDICTION	1
CONSTITUTIONAL PROVISION INVOLVED	1
STATEMENT OF THE CASE	2
REASONS FOR GRANTING THE WRIT	11
I. CERTIORARI SHOULD BE GRANTED TO RESOLVE THE CONFLICT AMONG THE CIRCUITS REGARDING WHETHER OR NOT A SEVERE DRUG PROBLEM MUST BE SHOWN BEFORE A SCHOOL BOARD MAY CONSTITUTIONALLY INITIATE A DRUG-TESTING PROGRAM APPLICABLE TO STUDENTS INVOLVED IN EXTRACURRICULAR ACTIVITIES	12
II. CERTIORARI IS WARRANTED BECAUSE THE DECISION BELOW CONFLICTS WITH DECISIONS OF THIS COURT ON THE CONSTITUTIONALITY OF STUDENT SEARCHES, GENERALLY, AND STUDENT DRUG TESTING SPECIFICALLY	18
III. THE DECISION BELOW IMPOSES AN IMPERMISSIBLE RESTRAINT UPON THE DISCRETION OF LOCAL BOARDS OF EDUCATION WHICH WARRANTS THIS COURT'S IMMEDIATE REVIEW	25
CONCLUSION	28

TABLE OF CONTENTS—Continued

	Page
Appendix A	1a
Appendix B	46a
Appendix C	47a
Appendix D	50a
Appendix E	79a
Appendix F	80a

TABLE OF CITED AUTHORITIES

CASES	Page
Acton v. Vernonia School Dist. 47J, 796 F.Supp 1354 (D. Ore. 1992)	6
Acton v. Vernonia School Dist. 47J, 23 F.3d 1514 (CA9 1994)	13, 14
Board of Educ., Island Trees Union Free School District No. 26 v. Pico, 457 U.S. 853 (1982)	26
Chandler v. Miller, 520 U.S. 305 (1997)	8
Earls v. Board of Edu. of Tecumseh Public School District, 115 F.Supp.2d 1281 (W.D. Okl. 2000)	1
Earls v. Board of Edu. of Tecumseh Public School District, 242 F.3d 1264 (CA10 2001)	1
Ferguson v. City of Charleston, 532 U.S. ____, 121 S. Ct. 1281 (2001)	16, 17
Knox County Education Association v. Knox County Board of Education, 158 F.3d 361 (CA6 1998)	15
Miller v. Wilkes, 172 F.3d 574 (CA8 1999)	2, 15, 16
New Jersey v. TLO, 469 U.S. 602 (1989)	11, 18
Oklahoma High School Athletic Ass'n v. Bray, 321 F.2d 269 (CA10 1963)	5
Skinner v. Railway Labor Executives Ass'n., 489 U.S. 602 (1989)	23
Todd v. Rush County Schools, 983 F.Supp 799 (S.D. Ind. 1997)	13, 14
Todd v. Rush County Schools, 133 F.3d 984 (CA7 1998) (rehearing and suggestion for rehearing *en banc* denied 139 F.3d 571 (CA7 1998)) (*cert. denied* 525 U.S. 824 (1998))	2, 13, 16, 17
Treasury Employees v. Von Raab, 489 U.S. 656 (1989)	16, 23

TABLE OF CITED AUTHORITIES—Continued

	Page
Trinidad School Dist. No. 1 v. Lopez, 963 P.2d 1095 (Colo. 1998)	11
Vernonia School District 47J v. Acton, 515 U.S. 646 (1995)	i, 4, 19, 20, 23, 24, 25
CONSTITUTION AND STATUTES	
U.S. Const. amend. IV	1
28 U.S.C. § 1254(1)	1
28 U.S.C. § 1331	7
28 U.S.C. § 1343	7
MISCELLANEOUS	
Respondent's Brief, *Vernonia School Dist. 47J*, 515 U.S. 646 (1995) (No. 92-590)	7

PETITION FOR A WRIT OF CERTIORARI

Petitioners respectfully petition for a writ of certiorari to review the judgment of the United States Court of Appeals for the Tenth Circuit in this case.

OPINIONS BELOW

The opinion of the court of appeals (App. A, *infra,* 1a-45a) is reported at 242 F.3d 1264 (CA10 2001). The court of appeals' order denying a petition for rehearing and suggestion for rehearing *en banc* (App. B, *infra,* 46a) and the court of appeals' order granting attorney fees and costs (App. C, *infra,* 47a-49a) are unreported. The district court's opinion (App. D, *infra,* 50a-78a) is reported at 115 F.Supp.2d 1281 (W.D. Okl. 2000). The district court's judgment (App. E, *infra,* 79a) and amended judgment[1] (App. F, *infra,* 80a-81a) are unreported.

STATEMENT OF JURISDICTION

The court of appeals entered its opinion on March 21, 2001, and denied rehearing and rehearing *en banc* on May 30, 2001. Petitioners invoke this Court's jurisdiction under 28 U.S.C. § 1254(1).

CONSTITUTIONAL PROVISION INVOLVED

The Fourth Amendment to the United States Constitution provides:

> The right of the people to be secure in their persons, houses, papers, and effects, against unreasonable searches and seizures, shall not be violated, and no

---

[1] After the district court rendered its opinion, the court allowed Plaintiffs to amend the judgment to add as a Plaintiff Lacey Earls in order to avoid any mootness problem, since Lindsay Earls and Daniel James were seniors in high school. Respondents Lindsay Earls and Daniel James have now graduated from high school. Respondent Lacey Earls remains a student in Petitioners' school.

Warrants shall issue, but upon probable cause, supported by Oath or affirmation, and particularly describing the place to be searched, and the persons or things to be seized.

STATEMENT OF THE CASE

This case involves the authority of a local board of education to determine if students are using drugs in its school district and the extent of its authority to implement a suspicionless drug-testing program as a means to deter and combat the drug use.

Contrary to the Seventh Circuit's opinion in *Todd v. Rush County Schools*, 133 F.3d 984 (CA7 1998) (rehearing and suggestion for rehearing *en banc* denied 139 F.3d 571 (CA7 1998)) (*cert. denied* 525 U.S. 824 (1998)) ("*Todd*"),[2] the Tenth Circuit holds that there is some unknown and undefined quantum of drug use among students which must be reached and therefore condoned by school officials before a board of education may implement a suspicionless drug-testing policy.

When constitutional challenges are brought against student drug-testing policies, the Tenth Circuit has determined that a board of education must prove in a rigid, legalistic fashion that a "severe enough" drug problem has gained a stronghold among certain students before it may take steps to deter and treat the problem through suspicionless drug-testing.

1. Petitioners are a public school district located in Tecumseh, Oklahoma, and its governing body charged with the tutelage, supervision and safety of the students within its boundaries. Tecumseh, Oklahoma is a predominantly rural community located approximately forty miles from

[2] The Tenth Circuit opinion also conflicts with the Eighth Circuit's published opinion in *Miller v. Wilkes*, 172 F.3d 574 (CA8 1999) ("*Miller*"). However, that judgment was vacated on grounds of mootness and rehearing dismissed on June 15, 1999. *Miller*, 172 F.3d at 582.

Oklahoma City. Consistent with the practice of most public schools, Petitioners offer activities beyond the traditional and required educational curriculum for their students. These voluntary student activities are provided primarily because society has placed upon Petitioners an ever-expanding role in the development of our children.

The traditional six-hour day has all but vanished in our society. Students are now engaging in activities on campus before classroom instruction begins, after classroom instruction ends, and on weekends. Students are also often off-campus traveling to other towns, cities and states, enjoying the benefits of the additional opportunities offered by Petitioners and other public schools throughout the nation.

As these extracurricular opportunities have expanded, the responsibilities of Petitioners have also increased. Petitioners are now responsible for the health and safety of students during untraditional times in untraditional settings.

In response to a long-standing problem of drug use among students in its school district, Petitioners have undertaken various measures to deter and eradicate this insidious problem. Those measures include surveillance cameras, drug education, drug dogs, and increased security personnel. Despite those measures, school officials continue to be aware that drug use among its students has not been eliminated. The individual members of the Petitioner board of education, who are all parents or grandparents of students in the school district, have reasonably relied upon information given to them by parents, administrators, teachers and students to determine that drug use among the students exists. Likewise, administrators and teachers have not only reasonably relied upon information they have received from students, but also from their observations of student conduct, awareness of student discussion of drug use, detection of the odor of marijuana, and knowledge of students who have been placed in drug rehabilitation programs to determine that the

long-standing drug problem in the school district is still a very real concern.

The subject of drug testing to combat student drug abuse has been discussed by the members of the Petitioner board of education since at least the 1994-95 school year.

During the 1997-98 school year, drug use by students was beginning to be openly acknowledged by the community. Patrons began telephoning individual members of the board of education and some even stopped them in the street to discuss the drug problem among students. A parent appeared at a public board of education meeting in February 1998, and openly discussed the drug abuse that was affecting her son and other students in the school district. A short time after that board meeting, marijuana was found in the school parking lot and marijuana was found on a student at school.

In September 1998, Petitioners implemented a suspicionless drug-testing program.[3] Prior to implementing the program, Petitioners considered various options and were aware of this Court's decision in *Vernonia* as well as the Seventh Circuit's reasoning in *Todd*. Petitioners considered testing only athletes (as in *Vernonia*), testing all students involved in any extracurricular activity (as in *Todd* and *Miller*), and testing all students in the school district. Petitioners also held a public meeting and invited its patrons to comment on the proposed program. Approximately fifty patrons attended the meeting, including the mother of Respondents Lindsay and Lacey Earls, and not one patron voiced disagreement with the suspicionless drug testing of their children.

After discussion and community participation, the Petitioner board of education limited the program to cover only those students who engage in interscholastic competition

[3] The program contained in the drug-testing policy adopted by Petitioners is patterned after and similar to the program approved by this Court in *Vernonia*, 515 U.S. at 658-660.

regulated by the Oklahoma Secondary Schools Activities Association ("OSSAA"). Every Oklahoma public school district that desires to engage in interscholastic competition must belong to the OSSAA, a statewide organization that regulates such activities. Failure of a school district or a participating student to abide by the rules and regulations of the OSSAA relating to interscholastic competition may result in the suspension from membership and/or ineligibility of the student to compete with any member school district of the OSSAA or member school district of a similar organization in another state. *See generally, Oklahoma High School Athletic Ass'n v. Bray*, 321 F.2d 269 (CA10 1963).

The program covered by the policy does not impose any academic sanctions upon a student who refuses to submit to a drug test or for a student who tests positive, nor does it prohibit a student from participating in any extracurricular activity. The program only prohibits a student who refuses to take the drug test from practicing for or engaging in the interscholastic competitive component of the activity, *i.e.*, regional, state and national contests. Moreover, if a student tests positive, the student is allowed to continue in interscholastic competition if the student agrees to participate in drug counseling and demonstrates no further drug use. If the student refuses to obtain counseling or continues to use drugs, the student can remain in the extracurricular activity, but is prohibited from further interscholastic competition for the remainder of the school year.

The activities involved in interscholastic competition are Athletics, Cheerleading, Pom Pon, Vocal, Band, FFA, FHA and Academic Team. Petitioners did not decide to direct the drug-testing program only to interscholastic competition on the premise that the students who engage in such competition are the only students, or even the most likely students, to abuse drugs. Interscholastic competitive activity participants were chosen in an effort to deter and hopefully eliminate drug

abuse by the large part of the student population:[4] 1) who have not been insulated from drug use; 2) who have already voluntarily placed themselves under more stringent academic and out-of-school rules and regulations; 3) who have a lesser degree of privacy than the general student population; and 4) who, with minimum school supervision, reap the benefits of representing the school district in competitions with students from all over the country and enjoy the privilege offered by the Petitioner board of education to travel and see the world outside of Tecumseh, Oklahoma. None of the other drug-preventative measures implemented by Petitioners are available or can be utilized for these students when they are competing off-premises.

The drug-testing policy provides that all students who desire to participate in interscholastic competitive activities are first tested at the beginning of the school year, at a specified and announced time. Thereafter, names are drawn at random each month for random student testing. Because the drug-testing was not commenced until midyear during the 1998-1999 school year, there was no initial testing that year of all students who desired to participate in the interscholastic competitive activities. However, random testing was initiated and 243 students were randomly tested during that school year. Three students tested positive, all of whom were involved in Athletics and two of which were also involved in the competitive activities of FFA. App. A, *infra*, 15a. In the 1999-2000 school year, the initial testing was started, and 241

[4] As the district court below recognized, "it can scarcely be disputed that the drug problem among the student body is effectively addressed by making sure that the large number of students participating in competitive, extra-curricular activities do not use drugs." App. D, *infra*, 77a. This is comparable to the situation in Vernonia, where "[a]pproximately 60-65% of the high school students and 75% of the elementary school students participate[d] in district sponsored athletics." *Acton v. Vernonia School Dist. 47J*, 796 F.Supp 1354, 1356 (D. Ore.1992).

students were tested. One child tested positive.[5] When this lawsuit was filed in August of 1999, Petitioners voluntarily suspended the drug-testing policy.[6] Of the students who tested positive for drug use, all but one chose to obtain counseling and stop taking illegal drugs. The policy was effective in deterring drug use and in providing treatment for those students whose drug abuse was detected.

2. Respondents brought this action in the district court and invoked its jurisdiction under 28 U.S.C. §§ 1331 and 1343.

Respondents are three students who, through their parents, contend they have the right under the Fourth and Fourteenth Amendments of the United States Constitution to participate in interscholastic competition without being required to submit to a suspicionless drug test. Respondents challenged the drug-testing policy as to all interscholastic competitive activities except Athletics, noting in their Complaint that such a program has been approved by this Court.

Respondent Lindsay Earls appeared on national television in August 1999, shortly after filing the lawsuit, and stated her belief that a widespread drug problem existed in the school district. She later stated in her deposition that after conferring with her friends she was unsure whether or not the drug problem was widespread. Moreover, she did not know if students involved in extracurricular activities use drugs.

At the time of the filing of the lawsuit, Respondent Daniel James had been enrolled in the school district for a little more than eighteen months. During that limited period of time, he had personally observed about a dozen students under the

[5] Although not mentioned in any of the *Vernonia* opinions, during the three years the drug-testing policy was in effect there only two students tested positive for drug use. Respondent's Brief at 7, *Vernonia*, (No. 92-590) (filed February, 1995).

[6] Therefore, the initial testing was not completed and many students, primarily non-athletes, were not tested at all during the 1999-2000 school year.

influence of drugs in out-of-school environments and knew of two students who had been admitted to drug rehabilitation facilities for drug abuse. He knew that students smoked marijuana in the city park during their lunch hour. He was also a member of an organization known as Life Guides, which conducted programs in a number of school districts, including the Petitioners' district, to educate students on the perils of drug use.

In spite of their knowledge of the drug use by students in the school district, Respondents argued to the district court that the evidence did not show a sufficient drug crisis to warrant suspicionless testing. Respondents urged the district court to conclude that this Court's holding in *Vernonia* was limited to the athletic arena because of the particular hazard of physical injury inherent in sports that would be exacerbated by drug abuse and the reduced privacy expectation of athletes. While recognizing that *Vernonia* acknowledged the existence of a "special need" in the public school context, Respondents further argued that *Chandler v. Miller*, 520 U.S. 305 (1997), reinvented the doctrine to require a school district to prove a "special need" different from the one recognized in *Vernonia* before a court can proceed to the balancing test set forth in *Vernonia*. According to Respondents, this new and different "special need" does not exist unless a board of education can show documented drug abuse among identified students to be tested or that drug abuse among the group to be tested poses a serious and particularized threat of injury to the group. Arguing that Petitioners could neither prove extraordinary drug use among the students to be tested, nor prove that non-athletic competition posed inherent danger of injury, Respondents concluded that there was no "special need" as required by *Chandler v. Miller, supra*. Therefore, they contended the need to balance the competing interests of the parties as set forth in *Vernonia* did not exist.

3. Being presented with cross-motions for summary judgment, the district court relied upon *Vernonia* to conclude that Petitioners' drug-testing program was reasonable. App. D, *infra*, 78a. In its opinion, the district court thoroughly recounted the evidence presented by both sides and compared it to the evidence and the reasoning employed by this Court in *Vernonia* and followed by the Seventh Circuit in *Todd*.

The district court reasoned that Petitioners indeed had demonstrated cause to be concerned about illegal drug use. The district court declined to agree with Respondents that a drug epidemic must be a precondition of suspicionless testing by noting "[t]he Supreme Court has found special governmental needs to justify suspicionless drug-testing in other contexts, without first finding a pervasive drug problem among the group to be tested." *Id.* 56a. The district court further disagreed that *Vernonia* required a showing of substantial risk of physical injury[7] or irrefutable evidence of actual use or possession of illegal drugs by students in order to determine that the school district presented an environment of "special needs." With regard to the latter, the district court found that "the Supreme Court's holding in Vernonia does not require a school district to isolate those students most likely to use drugs." *Id.* 77a. The district court concluded that the testing of students who desire to participate in interscholastic competition is a reasonable means adopted by Petitioners to attempt to stop and further deter drug use in light of the diminished privacy expectations of those students and the minimal intrusion of the collection process utilized. *Id.* 78a.

4. The court of appeals likewise stated it relied upon *Vernonia* as the only controlling precedent and declined to apply *Chandler v. Miller*, *supra*, to a student drug-testing challenge. App. A, *infra*, 9a. However, the Tenth Circuit reached the opposite result and held that Petitioners' drug-testing policy was unconstitutional. *Id.* 24a-25a.

---

[7] App. D, *infra*, 59a-60a

The court of appeals at first acknowledged that the school setting is an environment where "special needs" for the relaxation of the Fourth Amendment exist. It then proceeded to balance the competing private and governmental interests as required by *Vernonia*.

With respect to the privacy interests of Respondents, the Tenth Circuit recognized that students engaging in interscholastic competition have an even more diminished expectation of privacy than the general student population [8] and the collection process utilized by Petitioners was minimally intrusive.[9]

With regard to the governmental side of the balancing scale, the Court of Appeals held that the nature of the governmental concern must be based upon something other than deterrence of drug use among the students to be tested. The Tenth Circuit placed strong emphasis upon this Court's recognition of the increased danger of injury to student athletes in *Vernonia*, and required proof of safety concerns unique to each interscholastic competitive group to be tested. Thus, the Tenth Circuit held that Petitioners' concerns that students involved in interscholastic competition are at increased risk because of the threat of injury and decreased supervision fail as a basis for drug testing because the program excluded segments of the entire student population where other safety risks exist and included some competitive activities where the risk of injury is minimal. *Id.* 24a.

As to the immediacy of Petitioners concern of student drug use, the Tenth Circuit found that the board of education failed to identify actual drug users engaging in interscholastic competition in order to demonstrate that a drug problem existed. *Id.* In reaching this conclusion, the Tenth Circuit relied upon the Colorado Supreme Court's interpretation of

[8] App. A, *infra*, 21a.

[9] *Id.* 22a.

Vernonia, which had struck down a student drug-testing policy because it "swept within its reach students participating in an extracurricular activity who were not demonstrated to play a role in promoting drugs and for whom there was no demonstrated risk of physical injury." *Id*, 24a (quoting *Trinidad School Dist. No. 1 v. Lopez*, 963 P.2d 1095, 1110 (Colo. 1998)).

The Tenth Circuit has interpreted *Vernonia* to require a school district to "demonstrate that there is some identifiable drug abuse problem among a sufficient number of those subject to the testing, such that testing that group of students will actually redress its drug problem" before the school can impose suspicionless drug-testing as a prerequisite to participating in interscholastic competition. App. A, *infra*, 25a. Finding Petitioners' evidence to be "hearsay," [10] "anecdotal"[11] and "negligible"[12] with regard to students engaged in interscholastic competition, the court of appeals reversed the district court, holding the policy unconstitutional.

REASONS FOR GRANTING THE PETITION

The Petition should be granted for three reasons:

First, as the Tenth Circuit readily acknowledged,[13] its decision in this case directly conflicts with the Seventh Circuit's decision in *Todd* and the Eighth Circuit's decision in *Miller*.

Second, the decision of the court of appeals conflicts with this Court's decision and reasoning in *Vernonia*, *supra*, and *New Jersey v. TLO*, 469 U.S. 602 (1989)

[10] App. A, *infra*, 17a.

[11] *Id.*

[12] *Id.* 19a.

[13] App. A, *infra*, 26a.

("*TLO*") by setting forth different requirements for school officials contemplating the need for a student search within its jurisdiction.

Third, the issue presented is of major importance not only to Petitioners, but to all public schools in the nation which are responsible for the safety of the students under their supervision on a daily basis and must address drug use which threatens their safety.

I. CERTIORARI SHOULD BE GRANTED TO RESOLVE THE CONFLICT AMONG THE CIRCUITS REGARDING WHETHER OR NOT A SEVERE DRUG PROBLEM MUST BE SHOWN BEFORE A SCHOOL BOARD MAY CONSTITUTIONALLY INITIATE A DRUG-TESTING PROGRAM APPLICABLE TO STUDENTS INVOLVED IN EXTRACURRICULAR ACTIVITIES.

As the Tenth Circuit explicitly recognized, its decision departs from, disagrees with, and causes a conflict between the law applicable in the Tenth Circuit and that of the Seventh and Eighth Circuits. App. A, *infra*, 26a. This creates a dilemma for school districts in the remaining circuits and causes non-uniformity on this important constitutional question.[14]

---

[14] As recognized by the Tenth Circuit, "[t]he Fifth Circuit will have an opportunity to revisit this issue, because another Texas district court has recently held unconstitutional the random suspicionless drug testing of all students participating in extracurricular activities. *Gardner v. Tulia Indep. Sch. Dist.*, No. 2:97—CV-020-J (N.D. Tex. filed Dec. 7, 2000). The school district has appealed the case to the Fifth Circuit. The court in *Gardner*, after noting that there was no evidence of a drug problem among students in general at the Tulia schools or among those participating in extracurricular activities and therefore subject to testing, held that *Vernonia* 'was limited to random drug testing of the student athletes.' Slip op. at 8." App. A, *infra*, 27a, footnote 14. This Texas case further highlights the confusion and varying interpretations in the courts regarding the proper application of *Vernonia*.

In *Todd*, the Seventh Circuit was reviewing the constitutionality of a drug-testing policy which required all students who desired to participate in any extracurricular activity and students who chose to drive back and forth to school in their own vehicles to consent to suspicionless random drug-testing as a condition of being allowed to engage in those activities. The Seventh Circuit began its analysis by fully recognizing that the outcome of the case was governed by this Court's decision in *Vernonia*. *Todd*, 133 F.3d at 986.

In concluding that the drug-testing program in *Todd* was sufficiently similar to the drug-testing program in *Vernonia* to pass constitutional muster, the Seventh Circuit emphasized the voluntary aspect of student participation in extracurricular activities and the fact that the program was designed to deter drug use and not to catch and punish drug users. *Id.*

The Seventh Circuit did not disturb and affirmed the lower court's finding that the evidence of a drug problem in the school relied upon by the board of education to support the initiation of the policy, while "sketchy,"[15] did not cause the drug-testing policy to be unconstitutional. Recognizing that "the empirical evidence [was] not particularly indicative of drug, alcohol or tobacco use by a majority (or even a large minority) of the students [and] . . . the subjective observations

---

[15] *Todd v. Rush County Schools*, 983 F.Supp. 799, 803 (S.D. Ind. 1997). This is virtually identical to the evidence considered by the Ninth Circuit in *Acton v. Vernonia School Dist. 47J*, 23 F.3d 1514, 1519 (CA9 1994) (overruled by *Vernonia*, 515 U.S. 646) where, the Ninth Circuit "reemphasize[d] that what the evidence shows, and all it shows, is that there was some drug usage in the schools, that student discipline had declined, that athletes were involved, and that there was reason to believe that one athlete had suffered an injury because of drug usage and others may have."

[relied upon to support the policy in *Todd* were] somewhat vague, interspersed with what appears to be a motivating view that society in general has a drug problem,"[16] the district court found the governmental concern as articulated in *Vernonia* was established.

Contrary to the Tenth Circuit's departure from *Vernonia* where it holds that there must be an "identifiable" drug problem among a "sufficient" number of the students to be tested,[17] the district court in *Todd* agreed with this Court that "[t]here is no minimum triggering point of substance abuse (such as ten percent or fifty percent of the student population) that must be met to justify the 'important enough' interest on the part of the school system discussed in *Vernonia*. Some use of these prohibited substances by youth may give rise to legitimate concern about the potential for a rapid increase in abuse, if unchecked." *Todd v. Rush County Schools*, 983 F.Supp. 799, 806 (S.D. Ind. 1997).

---

[16] *Todd v. Rush County Schools, supra,* 983 F. Supp. at 803.

[17] In this particular respect, the Tenth Circuit adopts the holding of the Ninth Circuit that the student drug-testing policy there was unconstitutional on the basis that the dangers of drug abuse did not present the type of potential disaster that would warrant suspicionless drug testing of students. *Acton v. Vernonia School Dist. 47J, supra,* 23 F.3d at 1526. However, even the Ninth Circuit recognized that a school district could properly have a reasonable governmental concern of drug abuse without a showing that there was an "identifiable problem" among a "sufficient" number of students as now required in the Tenth Circuit. The Ninth Circuit acknowledged that the evidence presented by the school district there did not prove extensive drug use by students (footnote 15, *infra*), but stated: "Perhaps dubbing this a 'problem' is a matter of perception or definition. What appears to be a problem in one place might seem to be a minor annoyance elsewhere. Suffice it to say that drug use appeared to be more extreme than it should be and even seemed to be growing. It was sufficient to give them concern for the future of the youths they had responsibility for. Based upon the evidence, we cannot say that the concern was unreasonable." *Id.*, 23 F.3d at 1519.

The Eighth Circuit similarly addressed the random suspicionless drug-testing of all students engaged in any extracurricular activity in *Miller*.[18] In that case, the court likewise acknowledged that its disposition was controlled by this Court's decision in *Vernonia*. *Miller*, 172 F.3d at 578. In performing that analysis, unlike the Tenth Circuit in the instant case, the Eighth Circuit explicitly declined to read *Vernonia* to require a showing of an "identifiable" drug problem among the students to be tested before such a program could be initiated. In fact, the Eighth Circuit specifically found that there was no record evidence of any drug problem in the school whatsoever in *Miller* and that the drug problem was not in any measure "quantifiable." *Id.* 172 F.3d at 580-581. Contrary to the explicit holding of the Tenth Circuit that deterrence of drug abuse is not a sufficient governmental interest to warrant a suspicionless drug-testing program, the Eighth Circuit finds the need for deterrence is "imperative." *Id.* 172 F.3d at 580. The Eighth Circuit agrees with the Seventh Circuit that under *Vernonia* there is "no reason that a school district should be compelled to wait until there is a demonstrable problem with substance abuse among its own students before the district is constitutionally permitted to take measures that will help protect its schools against the sort of 'rebellion' proven in *Vernonia*, one 'fueled by alcohol and drug abuse as well as the student's [sic] misperceptions about the drug culture.'" *Id.* 172 F.3d at 581. Taking judicial notice of the drug problem that exists generally in this country, the Eighth Circuit recognized that a

---

[18] Although the Tenth Circuit expressly stated its opinion conflicted with the *Miller* opinion, it technically did not do so. *Miller* was vacated upon a suggestion of mootness because the sole student plaintiff had graduated and a proper justiciable controversy no longer existed. *Miller*, 172 F.3d at 582. However, the unanimous opinion of the panel in *Miller* does certainly indicate how the Eighth Circuit will decide the same issue in the future, and may properly be considered in this analysis of the conflict among the circuits.

governmental concern to "have a compelling interest in preventing an otherwise pervasive societal problem from spreading to the particular context" is important enough to justify a suspicionless search. *Id.* (quoting from *Treasury Employees v. Von Raab,* 489 U.S. 656, 675 n. 3 (1989)).

The conflict this decision has created among the jurisdictions is three-fold:

1) In the Tenth Circuit, the deterrent primary purpose [19] of a drug-testing policy is not a sufficient governmental concern to be weighed against the students' privacy interests to determine if the policy is constitutional. App. A, *infra*, 22a. The Seventh and the Eighth Circuits hold directly to the contrary, and recognize, as the district court found in the instant case, that the deterrent purpose of the policy is in and of itself a sufficient governmental concern. *Todd*, 133 F.3d at 987 and *Miller*, 172 F.3d at 581.

2) The school boards located in the Tenth Circuit's jurisdiction must be able to demonstrate an "identifiable" drug problem among the specific students to be tested before they are able to satisfy the "nature and immediacy" prong of the analysis set forth by this Court in *Vernonia*. App. A, *infra*, 25a. Conversely, there is no requirement in the Seventh and the Eighth Circuits that a board of education must condone and demonstrate some minimum quantum of drug use among its students before it can constitutionally enact a drug-testing policy in an effort to deter the infestation of drug abuse among students.[20]

---

[19] This Court has most recently explained that the programmatic purpose of a drug-testing program is a determinative factor in a "special needs" analysis. *Ferguson v. City of Charleston*, 532 U.S.____, 121 S.Ct. 1281, 1290 (2001).

[20] The Tenth Circuit's holding in this regard also conflicts with the Sixth Circuit's holding in *Knox County Education Association v. Knox County Board of Education,* 158 F.3d 361 (CA6 1998), that there need not be proof of a "pronounced" drug problem among teachers in a school before they could be compelled to submit to suspicionless drug-testing.

3) Finally, conflict is also present among the circuits with respect to the weight to be given to the voluntary aspect [21] of the activities when considering the nature of the privacy interests of the students to be tested. Contrary to the decision below, the Seventh Circuit, as well as the dissenting opinion of Judge Ebel in the Tenth Circuit,[22] find the voluntary nature of the activities compelling. *Todd*, 133 F.3d at 986 and App. A, *infra*, 39a-40a. Although the Tenth Circuit states that the privacy interests of students who voluntarily choose to compete is even more reduced than the diminished privacy interests of the student population at large,[23] the Tenth Circuit does not believe that further reduction "tips the scales" in the balancing test to any degree. There is now a split among the circuit courts of appeal with regard to the students who may be subject to a suspicionless drug-testing regime, and whether or not the voluntary participation aspect has relevance to the balancing test.

---

[21] As Justice Kennedy explained in his concurring opinion in the most recent case where this Court has considered the "special needs" doctrine, *Ferguson v. City of Charleston, supra*, 121 S.Ct. at 1295, "[a]n essential, distinguishing feature of the special needs cases is that the person searched has consented, though the usual voluntariness analysis is altered because adverse consequences, (*e.g.*, dismissal from employment or disqualification from playing on a high school sports team), will follow from refusal. The person searched has given consent, as defined to take into account that the consent was not voluntary in the full sense of the word."

[22] "[The panel places] too little weight on the fact that the testing here is limited to extracurricular activities, where the students have voluntarily submitted themselves to additional supervision and regulation." App. A, *infra*, 39a-40a.

[23] *Id.* 21a.

II. CERTIORARI IS WARRANTED BECAUSE THE DECISION BELOW CONFLICTS WITH DECISIONS OF THIS COURT ON THE CONSTITUTIONALITY OF STUDENT SEARCHES, GENERALLY, AND STUDENT DRUG TESTING SPECIFICALLY.

In *TLO*, this Court acknowledged the unique position in which public school officials are placed by society. Recognizing that these officials have a substantial interest in maintaining order and discipline at schools, this Court refused to require school officials to educate themselves in the legalities of the Fourth Amendment to the United States Constitution when the search of a student is considered. Since that time the standard for a school search has been one of reason and common sense.

In the concurring opinion in *TLO*, Justice Blackmun first coined the phrase "special needs" to explain this exception to the requirements of the Fourth Amendment when he stated: "The elementary and secondary school setting presents a special need for flexibility justifying a departure from the balance struck by the Framers." *TLO*, 469 U.S. at 352.

That flexibility was recognized in *TLO* when the individualized search of the student's purse was conducted by a school official based solely upon information the official received from a teacher who claimed the student had been smoking. This evidence was clearly hearsay in its legal sense, but it was determined by this Court to be a "common sense conclusion about human behavior upon which practical people—including government officials—are entitled to rely." *Id.*, 469 U.S. at 346. By footnote this Court repeated its emphasis on the comprehensive authority of school officials, consistent with constitutional safeguards, to prescribe and control conduct in their school. *Id.*, 469 U.S. at 342, footnote 9.

Vernonia solidifies the well-settled principal that a public school is a special needs environment which constitutionally permits school officials to exercise a degree of control over students that cannot be exercised over adults, for the good of the students and their classmates. *Vernonia*, 515 U.S. at 655-656.

Vernonia sets the standard for school districts in the nation to implement suspicionless drug-testing programs in their schools. Due to the special needs of the school environment, the reasonableness of a school suspicionless search program is judged by balancing: 1) the nature of the privacy interest of the student and the character of the privacy intrusion, against; 2) the nature and immediacy of the governmental concern and the efficacy of the means employed for meeting the concern. "When the government acts as guardian and tutor the relevant question is whether the search is one that a reasonable guardian and tutor might undertake." *Id.*, 515 U.S. at 665.

It is well settled from *TLO* and its progeny that students generally have a diminished legitimate expectation of privacy when they are entrusted to the care of school officials. Whether or not this lessened privacy expectation, standing alone, is sufficiently diminished to allow suspicionless drug-testing is not addressed in *Vernonia* and is not at issue here. The Tenth Circuit determined, albeit reluctantly, that students wishing to participate in interscholastic competition have a reduced privacy expectation interest, and a drug-testing program, almost identical to the program in *Vernonia*, is minimally intrusive.

The factors which this Court found relevant in *Vernonia* to determine that the expectation of privacy among school athletes is further diminished, such as the voluntary nature of participation in competitive activities and the higher degree of regulation inherent in athletic competition, exist in all interscholastic competitive activities covered by the policy at

issue here. The third factor, the element of "communal undress," exists in a number of those activities. Yet, in balancing the nature of the governmental concern against these factors, the Tenth Circuit places a substantial burden of proof upon Petitioners as well as other school districts to outweigh the minimal expectation of privacy afforded to these students in order to tip the scale in favor of school officials. It is therefore the governmental side of the balancing scale and the weight afforded to each side wherein the conflict lies.

The nature of the State's interest as schoolmaster must be "an interest which is important enough to justify the particular search at hand, in light of other factors which show the search to be relatively intrusive upon a genuine expectation of privacy." *Id.*, 515 U.S. at 661. It is clear, following *Vernonia*, that the deterrence of drug use by our nation's schoolchildren is an important enough concern in our public schools to justify a suspicionless search of students by school officials. This Court acknowledged that "the necessity for the State to act is magnified by the fact that this evil is being visited not just upon individuals at large, but upon children for whom it has undertaken a special responsibility of care and direction." *Vernonia*, 515 U.S. at 662.

Although the Tenth Circuit acknowledges the importance of deterrence, it interprets *Vernonia* as requiring something much more, and indeed that further programmatic purposes [24] must be demonstrated, before the nature of the governmental concern will be deemed important enough to support a suspicionless search. App. A, *infra,* 22a.

Petitioners disagree that deterrence, standing alone, is not a sufficient governmental concern to be weighed against the privacy expectations of the students in question. But, notwithstanding deterrence, even Petitioners' additional

[24] *See*, footnote 19, *infra.*

concerns of drug use generally, the risk of physical injury due to the nature of some of the activities and the risk of harm due to limited supervision, are not sufficient to meet this threshold test fashioned by the Tenth Circuit.

With regard to safety, the court of appeals holds that school districts must demonstrate the particularized risk of injury in the specific competitive activity that will be subject to the search before safety can be this additional factor of legitimate concern. "It is difficult to imagine how participants in vocal choir, or the academic team, or even the FHA are in physical danger if they compete in those activities while using drugs, any more than any student is at risk simply from using drugs." *Id.* 23a. Logically, if one is to interpret *Vernonia* as the court of appeals suggests, boards of education who implement suspicionless drug-testing programs for their athletes based in part on their concern for their safety will be required to exclude those athletes who compete in non-contact sports such as golf because the game of golf poses no inherent risk of danger any greater than students engaging in horseplay in the classroom. In the non-athletic competitive arena, this decision may well require school officials to exclude from its drug-testing program a band member who plays the flute and include in the program a band member who plays the tuba or twirls a burning baton because of the inherent particularized danger the size or nature of their instruments pose to students who are under the influence of illegal drugs, or to those around them.

The court of appeals in footnote 12 of the opinion thereafter proceeds to completely exclude safety as a legitimate concern by stating: "To the extent one could argue that the safety issue here is the health care risk of addiction or physical harm from the use of drugs, then the logical solution is to test all students. The fact that the District only tests a select group of students—those participating in extracurricular activities—indicates that its testing Policy is not

motivated simply by health care concerns." *Id.* 31a. This rationale will preclude all school districts within the boundaries of the Tenth Circuit from citing concern for the safety of its students as a factor when considering a suspicionless drug-testing program limited to one group of students.

Likewise, the nature of a school district's concern in the Tenth Circuit cannot be based in part upon the fact that students, while engaged in extracurricular competitive activities, are subject to decreased levels of supervision. As determined by the court of appeals, "[s]tudents who do not participate in any extracurricular activities are, at times, less supervised than they are in the classroom—when they are in the hallways between classes, at lunch, immediately before and after school while they are entering and leaving school premises." *Id.* 23a- 24a. Not only does the Tenth Circuit ignore the reality that teachers, police security and surveillance cameras are all utilized during the day to supervise and monitor the students when they are in the hallways, at lunch, and entering and leaving school, but also this concern once again becomes an all-or-nothing proposition.

In effect, a school district can implement a suspicionless drug-testing program in the Tenth Circuit only if the primary nature of the governmental concern goes beyond deterrence and encompasses all students who risk injury from drug abuse or all students who risk harm due to decreased supervision. *Vernonia* does not require such a perfect match, and as stated by Judge Ebel in his dissent from the Tenth Circuit decision: "In any event, we have never stated that a policy aimed at correcting a social ill need solve the entire problem in one fell swoop; in many cases it may be more prudent and efficacious to address social problems one step at a time, so that each step may be reviewed and adapted as necessary. *See, Williamson v. Lee Optical of Oklahoma, Inc.*, 348 U.S. 483, 489 (1955) ('[T]he reform may take one step

at a time, addressing itself to the phase of the problem which seems most acute to the legislative mind')." App. A, *infra*, 41a.

As for the immediacy of the concern, the *Vernonia* court relied upon the district court's finding that the "common sense" information gleaned by school officials, similar to the type of evidence accepted in *TLO,* indicated that a state of rebellion fueled by drug use existed at school and that athletes were involved. Petitioners readily admit that a state of rebellion does not exist at their school and the court of appeals correctly noted that *Vernonia* does not require such a showing. App. A, *infra,* 25a. However, this Court was quick to point out in *Vernonia* that it had previously upheld drug-testing programs in environments where special needs exist "based on findings of drug use by railroad employees nationwide, without proof that a problem existed on the particular railroads whose employees were subject to the test" [25] and "where there was no documented history of drug use by any customs officials." [26] *Vernonia,* 515 U.S. at 661. This Court further refused to hold a school district responsible for proving a compelling need for such a program by a "fixed, minimum quantum of governmental concern" as the Ninth Circuit appeared to do in the lower *Vernonia* decision. *Id.*

The Tenth Circuit decision requires more than a reasonable conclusion based on common sense information school officials receive from parents, teachers, members of boards of education, and other students, as well as their own observations of student conduct, that drug abuse exists in a school. In order to demonstrate the immediacy of its concern, a school district in the Tenth Circuit must now quantify a

---

[25] Citing to *Skinner v. Railway Labor Executives Assn.*, 489 U.S. 602, 607 (1989)

[26] Citing to *Treasury Employees v. Von Raab, supra,* 489 U.S. at 673.

"sufficient" amount of drug abuse that actually exists among the specific group of students it intends to test, *i.e.*, a "fixed minimum quantum of governmental concern," before it can implement a drug-testing program.

Yet, the Tenth Circuit does not establish a "bright-line" test for school boards to use, and recognizes there will be more litigation surrounding the determination it left up to other boards of education to divine the actual fixed minimum quantum of drug abuse required to meet this burden. App. A, *infra*, 25a. This added requirement placed on school districts is specifically contrary to and at odds with this Court's legitimate concern for school officials in *Vernonia* where the individual detection of actual drug users at school "adds to the ever-expanding diversionary duties of schoolteachers the new function of spotting and bringing to account drug abuse, a task for which they are ill prepared, and which is not readily compatible with their vocation." *Vernonia*, 515 U.S. at 664.

The Tenth Circuit has clearly articulated the law it establishes in our circuit: "Any district seeking to impose a random suspicionless drug-testing policy as a condition to participation in a school activity must demonstrate that there is some identifiable drug abuse problem among a sufficient number of those subject to the testing, such that testing that group of students will actually redress its drug problem." App. A, *infra*, 25a.

This decision applies well beyond the individual parties of this case. If it remains as the law in the Tenth Circuit, boards of education will be required to employ a method of drug detection which is beyond reasonable suspicion and even beyond probable cause to a method which must identify students and document proof of actual drug abuse before suspicionless drug testing will be constitutional. It will eliminate a vital tool utilized by those boards to deter and treat drug abuse by our children. It will require school

officials to point an accusatory finger at individual students and transform the process "into a badge of shame."[27]

Boards of education will be further required to condone the drug abuse of which they have knowledge based upon reason and common sense and educate and train their employees on the legal nuances of state and federal rules of evidence before the problem can be addressed through suspicionless drug testing. This decision is directly contrary to this Court's reasoning that "in many respects, we think, testing based on 'suspicion' of drug use would not be better, but worse." *Vernonia*, 515 U.S. at 664. This case accordingly merits this Court's intervention.

III. THE DECISION BELOW IMPOSES AN IMPERMISSIBLE RESTRAINT UPON THE DISCRETION OF LOCAL BOARDS OF EDUCATION WHICH WARRANTS THIS COURT'S IMMEDIATE REVIEW.

An overall theme emerges from this Court's decisions involving our nation's schools, *i.e.*, local boards of education have broad discretion in the control and management of our children and courts should be sensitive to and not interfere with that discretion unless basic constitutional values are directly and sharply implicated. As so eloquently stated by Chief Justice Burger, "local control of education involves democracy in a microcosm. In most public schools in the United States the parents have a large voice in running the school. Through participation in the election of school board members, the parents influence, if not control, the direction of their children's education. A school board is not a giant

---

[27] In *Vernonia*, 515 U.S. at 663, this Court recognized "[i]t may be impracticable [to employ only suspicion-based student drug testing], for one thing, simply because the parents who are willing to accept random drug testing for athletes are not willing to accept accusatory drug testing for all students, which transforms the process into a badge of shame."

bureaucracy far removed from accountability for its actions; it is truly 'of the people and by the people.' A school board reflects its constituency in a very real sense and thus could not long exercise unchecked discretion . . . ."[28]

This Court has spent many hours and hundreds of pages providing guidance to boards of education when constitutional issues are implicated in their decisions. This guidance has set standards in layman's terms for boards of education to follow, recognizing that these boards are, in reality, simply parents elected by other parents to direct the education of their children and provide for their well being.

The *Vernonia* decision is no exception to this Court's consistency when addressing the unique issues relating to boards of education and the United States Constitution. It sets the standard, in layman's terms, to guide local boards when considering the implementation of suspicionless drug-testing program in their schools. The standard informs local boards that the implementation of such a program is a valid and constitutional exercise of their discretion when: 1) they believe through reason and common sense that drug abuse exists in their school; 2) when they take methods to deter and eliminate drug use that have had a limited effect on the problem; 3) when they ask for input and receive positive support from their community for the program; 4) when they adopt a program to cover students who have voluntarily placed themselves in a position where they have an even more diminished privacy expectation than the general student population, and; 5) where those students as a whole are likely to suffer harm from physical injury or decreased supervision if under the influence of drugs. The Tenth Circuit's decision invalidates this standard and indeed raises the bar for the hundreds, if not thousands, of local boards of

[28] *Board of Educ., Island Trees Union Free School District No. 26 v. Pico*, 457 U.S. 853, 891 (1982) (Burger, C. J., dissenting).

education within its jurisdiction. The effects of the Tenth Circuit's decision on these boards will be disastrous and irreversible if not addressed by this Court. If school boards are required to first identify and keep a count of actual student drug users to determine if the number is "sufficient" to meet the test before they may utilize a suspicionless drug-testing program, the subsequent implementation of the program is meaningless and will be effectively eliminated as a tool to fight student drug abuse. If the implementation of a suspicionless drug-testing program becomes a meaningless tool in the Tenth Circuit, the *Vernonia* decision likewise becomes meaningless as a guide to those local boards within its jurisdiction. Even if a board of education determines to fight drug use through suspicionless drug testing and attempts to abide by the Tenth Circuit's decision, it will most likely face constitutional challenges. These challenges will necessitate the expenditure of precious dollars earmarked for the education of their children to demonstrate to the satisfaction of a court that the local board of education has met the ambiguous standard of finding an "identifiable" drug problem among a "sufficient" number of its students.

As candidly conceded by the Tenth Circuit, boards of education and courts will continue to grapple with the questions that are automatically raised from this decision[29]— When does a drug problem become "identifiable?" What type of evidence must boards of education gather to prove the problem has reached the "identifiable" stage? How many students does it take to equal a "sufficient" amount? How do boards of education know when they have reached the "sufficient" stage? Who makes these determinations?

This case is uniquely suitable to address the overall question presented since the relevant facts of the case are virtually undisputed. The Tenth Circuit's decision impermissibly raises the constitutional bar over which boards of

[29] App. A, *infra*, 27a.

education must ascend before they can validly exercise their judgment to implement a suspicionless drug-testing policy. The decision further conflicts with the holdings of this Court and of other circuit courts of appeal on this issue, further pointing to the urgent need for review by this Court.

CONCLUSION

For the foregoing reasons, the petition for a writ of certiorari should be granted.

Respectfully submitted,

LINDA MARIA MEOLI *
STEPHANIE J. MATHER
WILLIAM P. BLEAKLEY
THE CENTER FOR EDUCATION LAW, INC.
809 N.W. 36th Street
Oklahoma City, OK 73118
(405) 528-2800

* Counsel of Record

Attorneys for Petitioners

August 2001

APPENDICES

APPENDIX A

UNITED STATES COURT OF APPEALS
TENTH CIRCUIT

[Filed Mar. 21, 2001]

No. 00-6128

LINDSEY EARLS and LACEY EARLS, minors, by their next friends and parents, John David Earls and Lori Earls; DANIEL JAMES, a minor, by his friend and mother, Leta Hagar,

Plaintiffs-Appellants,

v.

BOARD OF EDUCATION OF TECUMSEH PUBLIC SCHOOL DISTRICT, Independent School District No. 92 of Pottawatomie County; TECUMSEH PUBLIC SCHOOL DISTRICT, Independent School District No. 92 of Pottawatomie County,

Defendants-Appellees.

OKLAHOMA STATE SCHOOL BOARDS ASSOCIATION; NATIONAL SCHOOL BOARDS ASSOCIATION; WASHINGTON LEGAL FOUNDATION; U.S. SENATORS JUDD GREGG and DON NICKLES; GOVERNOR FRANK KEATING; REP. FRED S. MORGAN (Oklahoma); OKLAHOMA SECONDARY SCHOOLS ACTIVITIES ASSOCIATION; ALLIED EDUCATIONAL FOUNDATION; GAYLA D. DUKE; RHONDA ELLARD; DEBRA FLETCHER; BOBBETTE HAMILTON; JIMMY and SHEILA JORDAN; MICHAEL and KIM RAWLS; STEWART and ROSHEL STABEL; KENNETH A. STANLEY; KRIS STEELE; CLYDE L. and GAIL A. TOPPING; MIKE and VALERIE TUCKER; STEVE and LYNNE YOUNG; THE AMERICAN PUBLIC HEALTH ASSOCIATION; THE NATIONAL ASSOCIATION OF SOCIAL WORKERS; THE NATIONAL ASSOCIATION OF SOCIAL

WORKERS—OKLAHOMA CHAPTER; THE CENTER FOR LAW AND EDUCATION; THE NATIONAL CENTER FOR YOUTH LAW; THE JUVENILE LAW CENTER; THE LOYOLA CHILDLAW CENTER; ADVOCATES FOR CHILDREN OF NEW YORK; LAWYERS FOR CHILDREN; COVENANT HOUSE NEW JERSEY; PROFESSOR MARTIN GUGGENHEIM & PROFESSOR RANDY HERTZ; AMERICAN ACADEMY OF PEDIATRICS,

Amici Curiae.

Appeal from the United States District Court
for the Western District Of Oklahoma
(D.C. NO. CV-99-1213-R)

Before BRORBY, ANDERSON, and EBEL, Circuit Judges.

ANDERSON, Circuit Judge.

Plaintiffs Lindsay Earls and Daniel James are students at Tecumseh High School.[1] By their next friends and parents, John David and Lori Earls and Leta Hagar, they brought this 42 U.S.C. § 1983 action against the Board of Education of the Tecumseh Public School District and the Tecumseh Public School District (collectively the "District"), challenging the constitutionality of the random suspicionless urinalysis drug testing policy which the District implemented for all students participating in competitive extracurricular activities. The district court granted summary judgment in favor of the District, concluding that the policy does not violate the Fourth Amendment's prohibition against unreasonable searches. Plaintiffs appeal that decision.

We have received three amicus briefs: one from The American Public Health Association, The National Association of Social Workers, The National Association of Social

[1] Lacey Earls was added as a plaintiff shortly before the district court issued its judgment in this case.

Workers-Oklahoma Chapter, The Center for Law and Education, The National Center for Youth Law, The Juvenile Law Center, The Loyola ChildLaw Center, Advocates for Children of New York, Lawyers for Children, Covenant House New Jersey, Professor Martin Guggenheim, Professor Randy Hertz, and the American Academy of Pediatrics, in support of plaintiffs; one from The Oklahoma State School Boards Association and The National School Boards Association, in support of the District; and one from the Washington Legal Foundation, United States Senators Judd Gregg and Don Nickles, Governor Frank Keating, Representative Fred S. Morgan, the Oklahoma Secondary Schools Activities Association, the Allied Educational Foundation, Gayla D. Duke, Rhonda Ellard, Debra Fletcher, Bobbette Hamilton, Jimmy and Sheila Jordan, Michael and Kim Rawls, Stewart and Roshel Stabel, Kenneth A. Stanley, Kris Steele, Clyde L. and Gail A. Topping, Mike and Valerie Tucker, and Steve and Lynne Young, in favor of the District.

Because we conclude that the policy violates the Fourth Amendment, we reverse and remand this case.

BACKGROUND

Tecumseh High School has for many years offered a variety of extracurricular activities for students interested in participating therein. Such activities have included the choir, band, color guard, Future Farmers of America ("FFA"), Future Homemakers of America ("FHA"), and the academic team. Additionally, it has also sponsored athletic teams, cheerleaders and Pom Pon.[2] "The vast majority of students participate in one or more school-sponsored activities." *Earls v. Bd. of Educ.*, 115 F. Supp. 2d 1281, 1282 (W.D. Okla. 2000).

[2] The drug testing policy itself and the district court's opinion both describe this activity as Pom Pon. We accordingly refer to it that way in this opinion.

On September 14, 1998, the District adopted the Student Activities Drug Testing Policy (the "Policy") requiring drug testing of all students who participate "in any extra-curricular activity such as FFA, FHA, Academic Team, Band, Vocal, Pom Pon, Cheerleader and Athletics." Tecumseh Public Schools Student Activities Drug-testing Policy at 2, Appellants' App. Vol. I at 107. Each student seeking to participate in such activities must sign a written consent agreeing to submit to drug testing prior to participating in the activity, randomly during the year while participating, and at any time while participating upon reasonable suspicion. The test detects amphetamines, cannabinoid metabolites (marijuana), cocaine, opiates, barbiturates and benzodiazepines. It does not detect alcohol or nicotine. Students subject to the Policy must pay a yearly fee of four dollars. Although the Policy does not expressly so state, it is undisputed that the Policy has in fact only been applied to those extracurricular activities involving some aspect of competition and which are sanctioned by the Oklahoma Secondary Schools Activity Association ("OSSAA").

The district court described the actual drug testing process as follows, which the parties do not dispute:

> [T]he students to be tested are called out of class in groups of two or three. The students are directed to a restroom, where a faculty member serves as a monitor. The monitor waits outside the closed restroom stall for the student to produce the sample. The monitor pours the contents of the vial into two bottles. Together, the faculty monitor and the student seal the bottles. The student is given a form to sign, which is placed, along with the filled bottles, into a mailing pouch in the presence of the student. Random drug testing was conducted in this manner on approximately eight occasions during the 1998/1999 school year. Approximately twenty students were tested each time.

Earls, 115 F. Supp. 2d at 1290-91. At the time of the testing, the monitor also gives each student a form on which he or she may list any medications legally prescribed for the student. According to the Policy, "[t]he medication list shall be submitted to the lab in a sealed and confidential envelope and shall not be viewed by district employees." Policy at 5, Appellants' App. Vol. I at 110.

The results of the drug tests are placed in confidential files separate from the students' other educational files. They "shall be disclosed only to those school personnel who have a need to know, and will not be turned over to any law enforcement authorities." *Id.* Students who refuse to submit to the drug testing under the Policy are prohibited from participating in any extracurricular activities. There are no academic sanctions imposed.

Plaintiff Lindsay Earls is a member of the show choir, the marching band and the academic team. Plaintiff Daniel James apparently seeks to participate in the academic team and was enrolled during the 1999-2000 school year in the academic team class. They and their parents challenge the application of the Policy to them as a condition to their participation in those activities. Plaintiffs do not challenge the policy as it applies to athletes.

DISCUSSION

We review de novo the district court's grant of summary judgment. *Phelan v. Laramie County Cmty. Coll. Bd. of Trs.*, 235 F.3d 1243, 1246 (10th Cir. 2000). Accordingly, summary judgment is appropriate "if the pleadings, depositions, answers to interrogatories, and admissions on file, together with affidavits, if any, show that there is no genuine issue as to any material fact and that the moving party is entitled to judgment as a matter of law." Fed. R. Civ. P. 56(c). When we apply this standard, we examine the record and any reasonable inferences drawn therefrom in the light most

favorable to the non-moving party. *19 Solid Waste Dept. Mechs. v. City of Albuquerque*, 156 F.3d 1068, 1071 (10th Cir.1998).

The Fourth Amendment ordinarily requires "some quantum of individualized suspicion" before a search may constitutionally proceed. *United States v. Martinez-Fuerte*, 428 U.S. 543, 560 (1976). However, the Supreme Court has recognized that "the Fourth Amendment imposes no irreducible requirement of such suspicion." *Id.* at 561. Rather, "the ultimate measure of the constitutionality of a governmental search is 'reasonableness.'" *Vernonia Sch. Dist. v. Acton*, 515 U.S. 646, 652 (1995). The Court has further held that the "state-compelled collection and testing of urine" is a search subject to the Fourth Amendment's reasonableness requirement. *Id.* (citing *Skinner v. Ry. Labor Execs. Ass'n*, 489 U.S. 602, 617 (1989)).

Because we are presented in this case with a Fourth Amendment search of school children while at school, we first examine the general nature of the rights and obligations of students and school personnel in the school setting. It is "indisputable . . . that the Fourteenth Amendment protects the rights of students against encroachment by public school officials." *New Jersey v. T.L.O.*, 469 U.S. 325, 334 (1985). As state actors, therefore, school personnel "do not merely exercise authority voluntarily conferred on them by individual parents; rather, they act in furtherance of publicly mandated educational and disciplinary policies." *Id.* at 336. However, while school authorities do not act merely *in loco parentis* when interacting with students, the Court has made it clear that their power over students is "custodial and tutelary, permitting a degree of supervision and control that could not be exercised over free adults." *Vernonia*, 515 U.S. at 655. Thus, while students retain their Fourth Amendment right to be free from unreasonable searches while at school, the nature of that right is different-it "is what is appropriate for children

in school." *Id.* at 656. It is in this unique environment that we examine the constitutionality of the Policy.

The District justifies the Policy based on the "special needs" doctrine, which the Supreme Court has developed through a series of cases permitting suspicionless drug testing in certain situations. In *Skinner v. Ry. Labor Exec. Ass'n*, 489 U.S. 602 (1989), the Court upheld the suspicionless drug testing of railroad employees who had been involved in accidents. It explained the "special needs" doctrine as follows:

> We have recognized exceptions to . . . [the warrant requirement] when special needs, beyond the normal need for law enforcement, make the warrant and probable-cause requirement impracticable.
>
> When faced with such special needs, we have not hesitated to balance the governmental and privacy interests to assess the practicality of the warrant and probable-cause requirements in the particular context.

Id. at 619 (quotations omitted). Accordingly, under the special needs doctrine, the Court identifies a special need which makes impracticable adherence to the warrant and probable cause requirements, then balances the government's interest in conducting the particular search against the individual's privacy interests upon which the search intrudes.

Employing that analysis, in *Nat'l Treasury Employees Union v. Von Raab*, 489 U.S. 656 (1989), the Court upheld Customs Service regulations requiring suspicionless drug testing for Customs Service employees seeking positions involving the interdiction of illegal drugs or requiring the carrying of firearms. In *Vernonia*, again invoking the special needs doctrine, the Court upheld the suspicionless drug testing of student athletes at a high school and middle school. Finally, in *Chandler v. Miller*, 520 U.S. 305 (1997), finding that Georgia had failed to demonstrate a "special need"

justifying the particular search at issue, the Court held unconstitutional a Georgia statute requiring candidates for certain public offices to certify that they had taken a urinalysis test within thirty days prior to qualifying for nomination or election and that the test was negative.

Chandler was the first case in which the Court found the government failed to demonstrate a special need. Our court has recently held that in *Chandler*, "the Court added a step to the analysis it had followed in *Skinner*, *Von Raab*, and [*Vernonia*]." *19 Solid Waste Dept. Mechs.*, 156 F.2d at 1072. We held that *Chandler* requires courts to inquire first into whether the government has established the existence of a special need before proceeding to any balancing of government and private interests. We defined that inquiry as two-fold: first, "whether the proffered governmental concerns were 'real' by asking whether the testing program was adopted in response to a documented drug abuse problem or whether drug abuse among the target group would pose a serious danger to the public"; and second, "whether the testing scheme met the related goals of detection and deterrence." *Id.* at 1073. These special needs cases provide the parameters for our analysis.[3]

The parties argue vigorously over which of these cases should primarily guide our decision in this case. Plaintiffs argue that *Chandler*, as interpreted by our court in *19 Solid Waste Mechs.*, governs and compels the conclusion that the District has failed to establish the existence of a special need. They argue that the existence of a special need is a threshold test; the District has failed to demonstrate such a need because it has failed to show that a drug problem exists among the tested group; and we therefore need not even reach

[3] The Supreme Court's special needs cases have engendered some criticism for failing to adequately define what a special need is. *See, e.g.*, Robert D. Dodson, *Ten Years of Randomized Jurisprudence: Amending the Special Needs Doctrine*, 51 S.C.L. Rev. 258, 261 (Winter 2000).

the balancing analysis. However, they argue, were we to reach the balancing analysis, we would still conclude that the Policy is unconstitutional.

The District responds that *Vernonia* remains the authoritative guide for a case such as this involving an allegation of special need for a suspicionless search in a public school environment. It argues that a special need exists because the District did in fact demonstrate the existence of a drug problem at the school. Further, the balancing analysis would compel the conclusion that the Policy is constitutional.

We begin by noting that, while there may indeed be some confusion as to the application of the special needs doctrine in other settings, we deal here with the unique environment of the school setting. Thus, we take *Vernonia*, the only Supreme Court case involving suspicionless drug testing of a group of students at a public school, as the primary guide for our analysis of this case. As the Supreme Court explicitly stated in *Vernonia*, "[w] e have found . . . 'special needs' to exist in the public school context," where adherence to the traditional Fourth Amendment requirements of a warrant and probable cause "'would unduly interfere with the maintenance of swift and informal disciplinary procedures [that are] needed,'" and would undermine "'the substantial need of teachers and administrators for freedom to maintain order in the schools.'" *Vernonia*, 515 U.S. at 653 (quoting T.L.O., 469 U.S. at 340-41). Whether or not the Supreme Court has raised the special need bar in other contexts, we must assume, until the Court directs us otherwise, that its analysis in *Vernonia* governs our analysis in this case. Thus, we agree that the District has demonstrated that there is a special need for a relaxation of the Fourth Amendment's standards in this case, and conclude that the constitutionality of the Policy will be determined by balancing the factors set forth in *Vernonia*.[4]

[4] Were we to agree with the plaintiffs that *Chandler* and *19 Solid Waste Mechs.* have raised the special need bar in all cases, including those

See Gruenke v. Seip, 225 F.3d 290, 300-01 (3d Cir. 2000) ("[I]n other circumstances, there may be 'special needs' that make probable cause impracticable. The public school context is one of those settings."). We turn, therefore, to an examination of *Vernonia*.

Significantly, the Court in *Vernonia* began its opinion by describing the serious drug problem which had developed in the Vernonia schools. While drugs had not previously been a major problem, '[i]n the mid-to-late 1980's . . . teachers and administrators observed a sharp increase in drug use." *Vernonia*, 515 U.S. at 648. "Along with more drugs came more disciplinary problems." *Id.* Moreover, "athletes were the leaders of the drug culture." *Id.* at 649. The Court adopted the following district court findings:

> [T]he administration was at its wits end and . . . a large segment of the student body, particularly those involved

---

involving public school contexts, we would still conclude that the District has demonstrated the existence of a special need.

As we stated in *19 Solid Waste Mechs.*, the *Chandler* Court in addressing the special need inquiry first "examined whether the proffered governmental concerns were 'real' by asking whether the testing program was adopted in response to a documented drug abuse problem or whether drug abuse among the target group would pose a serious danger to the public." *19 Solid Waste Mechs.*, 156 F.3d at 1073. Just as with Customs Service employees in *Von Raab*, the Court in *Chandler*, and our court in *19 Solid Waste Mechs.*, recognized that, even without a documented drug abuse problem, the potential danger of drug abuse among the target group may be sufficient to establish the existence of a special need. While drug abuse among a large portion of a school student body does not present the same kind of public safety danger as the Court surmised drug abuse among certain Customs Service employees could, it nonetheless would undeniably be a serious societal problem. Thus, we think a school concerned about drug abuse among its students has adequately demonstrated the existence of a special need. Of course, once a special need has been demonstrated, we must then balance the government's (in this case, the school's) interest in conducting the particular search in question against the privacy interests of those subject to the search.

> in interscholastic athletics, was in a state of rebellion. Disciplinary actions had reached "epidemic proportions." The coincidence of an almost threefold increase in classroom disruptions and disciplinary reports along with the staff's direct observations of students using drugs or glamorizing drug and alcohol use led the administration to the inescapable conclusion that the rebellion was being fueled by alcohol and drug abuse as well as the student's misperceptions about the drug culture.

Id.[5] Faced with this indisputably serious and widespread drug problem, the Vernonia schools adopted a suspicionless drug testing policy. The policy, which was administered in a manner very similar to the Policy in our case, applied to all students participating in interscholastic athletics.

The Court then reviewed its special needs doctrine, and stated, without more, "[w]e have found such 'special needs' to exist in the public school context." *Id.* at 653.[6] The Court proceeded to consider the various factors relevant to the required balancing of the search's "intrusion on the individual's Fourth Amendment interests against its

---

[5] Although Justice O'Connor's dissent in *Vernonia* questioned the sufficiency of the evidence in the record of a drug problem at the Vernonia middle school which the plaintiff attended when he filed suit against the school district, the majority's opinion adopts and relies upon the district court's findings about a serious drug problem in the Vernonia high schools. One cannot read the majority opinion and not appreciate that those factual findings regarding the existence of a documented drug problem among students subject to the drug testing were very important to the majority.

[6] What is unclear from a simple reading of *Vernonia* is whether the Court's finding of a special need was based upon the school setting alone, with the concomitant need for school officials to maintain order and discipline, yet fulfill their tutelary and custodial obligations, or whether it was based upon that need in conjunction with the documented serious drug problem at the Vernonia schools.

promotion of legitimate governmental interests." *Id.* (quoting *Skinner*, 489 U.S. at 619).

The Court explained that "[t]he first factor to be considered is the nature of the privacy interest upon which the search . . . intrudes." *Id.* at 654. The Court reiterated the primacy of the school setting: "[c]entral, in our view, to the present case is the fact that the subjects of the Policy are (1) children, who (2) have been committed to the temporary custody of the State as schoolmaster." *Id.* As such, students "have a lesser expectation of privacy than members of the population generally." *Id.* at 657 (quoting *T.L.O.*, 469 U.S. at 348 (Powell, J., concurring)). Student athletes have an even lower expectation of privacy because, in addition to enjoying a lesser degree of physical privacy in athletic locker rooms, the Court analogized student athletes to adults working in closely regulated industries who "have reason to expect intrusions upon normal rights and privileges, including privacy." *Id.*[7]

The Court then considered the character of the particular intrusion involved. After concluding that the physical process by which urine was collected for the drug testing was under conditions "nearly identical to those typically encountered in public restrooms," *id.* at 658, and therefore relatively unintrusive, the Court also examined whether the testing was unduly intrusive because of the information it disclosed about the individual's body. It determined that it was minimally intrusive in that regard because the test only revealed the existence of drugs, not medical or other physical conditions, the tests were all standardized, and the information revealed was disclosed only to those school personnel having a need to know, not to law enforcement or others within the school community. The Court also assumed that information about

[7] The Court cited *Skinner*, in which a factor favoring suspicionless drug testing of railroad employees was the fact that such employees already worked in "an industry that is regulated pervasively to ensure safety." 489 U.S. at 627.

prescription medications the student was compelled to reveal was kept confidential. Thus, the Court concluded the "invasion of privacy was not significant." *Id.* at 660.

Last, the Court examined the "nature and immediacy of the governmental concern at issue." *Id.* It noted more generally the importance of deterring drug use among schoolchildren, particularly given that the "[s]chool years are the time when the physical, psychological, and addictive effects of drugs are most severe," and that "the effects of a drug-infested school are visited not just upon the users, but upon the entire student body and faculty, as the educational process is disrupted." *Id.* at 661-62. Additionally, the Court noted that the testing policy at issue was not just directed at students in general, but, more narrowly, student athletes "where the risk of immediate physical harm to the drug user or those with whom he is playing is particularly high." *Id.* at 662. Moreover, the "particular drugs screened by the District's Policy have been demonstrated to pose substantial physical risks to athletes." *Id.*

As to the immediacy of the District's concerns, the Court stated, "we could not possibly find clearly erroneous the District Court's conclusion that 'a large segment of the student body, particularly those involved in interscholastic athletics, was in a state of rebellion,' that '[d]isciplinary actions had reached "epidemic proportions,"' and that 'the rebellion was being fueled by alcohol and drug abuse as well as by the student's misperceptions about the drug culture." *Id.* at 662-63. The Court characterized the problem as an "immediate crisis" of greater magnitude than that involved in either *Skinner* or *Von Raab*. And the Court concluded the District's solution to that crisis-drug testing student athletes-was self-evidently efficacious: "a drug problem largely fueled by the 'role model' effect of athletes' drug use, and of particular danger to athletes, is effectively addressed by making sure that athletes do not use drugs." *Id.* at 663.

Accordingly, after carefully considering all the factors discussed above, the Court upheld the Vernonia schools' drug testing policy. It emphasized two factors in particular: that the testing policy "was undertaken in furtherance of the government's responsibilities, under a public school system, as guardian and tutor of children entrusted to its care"; and that the district had demonstrated a severe need for the testing. *Id.* at 665.

Applying those factors to the Policy in this case, we reach a different conclusion. We first note that the evidence of drug use among those subject to the Policy is far from the "epidemic" and "immediate crisis" faced by the Vernonia schools and emphasized by the Supreme Court's opinion. The district court in this case admitted as much: "[a]dmittedly the evidence in this case does not show an epidemic of illegal drug use in the Tecumseh School District." *Earls*, 115 F. Supp. 2d at 1285. Rather, the evidence of actual drug usage, particularly among the tested students, is minimal: Dean Rogers, the president of the school board, testified that in 1999, a member of FFA was found with drug paraphernalia in his car. Appellants' App. Vol. I at 120, 137-38. She further testified that in 1990 or 1991, a student apparently under the influence of some substance was injured when a steer he was handling got loose, although it is unclear from her testimony whether this occurred during an FFA activity. *Id.* at 119-21. Principal James Blue testified that in the "many" years he had been principal of Tecumseh High School, there had been no alcohol or drug-related injuries or deaths. *Id.* at 162. Ms. Rogers also testified that in 1997 or 1998, she overheard a boy in FFA invite some other boys over to his house where "there would be plenty of smokes." *Id.* at 134.

Carolyn Daugherty, the vocal music teacher and choir director, testified that she had never caught a choir member using illegal drugs, Appellants' App. Vol. II at 286; that she has had students tell her they thought some other student was

using drugs, *id.* at 287; that she suspected some students were using some substance because "appearance wise their eyes looked dilated [and] [t]hey looked spaced out," *id.*; that she had referred one student to the office for suspected drug use during her twenty-nine years of teaching, *id.* at 289; that she did not recall ever telling the school board that choir members had a drug problem, *id.* at 290; that a choir member was caught six or seven years previously bringing alcohol concealed in a cough syrup bottle on a trip, *id.* at 292; and that, in her opinion, most of her choir students do not use drugs. *Id.* at 302.

Teacher Sheila Evans testified that she did not think that any of her students in FHA who competed used drugs. Appellants' App. Vol. III at 673. Teacher Danny Sterling testified that during the preceding five years, he had talked to the principal three to four times about some student in one of his classes that he suspected was using drugs. *Id.* at 711. One time he "actually smelt the aroma of pot." *Id.* at 712. He further testified that he estimates he sees ten students per year whom he believes are on drugs. None of these students competed with FFA. He testified that he believed that students in FFA were less likely to use drugs than students who were not so involved. *Id.* at 713.

Danny Jacobs, the assistant superintendent, testified that 243 students were tested under the Policy during the 1998-99 school year, and of those students, three tested positive, two high school students and one middle school student. Appellants' App. Vol. II at 408-09. He further testified that approximately 241 students were tested in the 1999-2000 school year, and one tested positive. *Id.* Principal James Blue testified that, with respect to the two high school students who tested positive, one was involved in wrestling and FFA and one was involved in baseball and FFA. Appellants' App. Vol. III at 570. Grant Gower testified that the student who tested positive in the 1999-2000 year played softball. *Id.* at 656-57.

In response to interrogatories, the District provided information that in the 1998-99 year, 208 students participated in FFA, 119 in FHA, 70 in Band, 14 in Academic Team and 75 in Vocal Music. *Id.* at 737. In the first semester of the 1999-2000 school year, 100 participated in FFA, 63 in FHA, 67 in Band, 16 in Academic Team and 65 in Vocal Music. *Id.* at 737-38.[8] Thus, in the 1998-99 year, of the 486 students who participated in the five listed extracurricular activities, two students, both also athletes, tested positive. And of the 311 students participating in extracurricular activities the first semester of the 19992000 year, only one student, apparently an athlete and not involved in any of the listed extracurricular activities, tested positive.

The record also contains photocopies of disciplinary referrals at the high school. Some contain no date indicating the year in which the incident occurred. Of the twenty incidents occurring over an unspecified period of time, thirteen resulted from a drug dog "hitting" or showing an interest in the student, or his or her vehicle or locker. One involved possession of marijuana. The remainder involved possession of or suspected consumption of alcohol. *Id.* at 633-51. There is no evidence as to whether any of the students given these disciplinary referrals were involved in extracurricular activities. Similarly, in its response to interrogatories, the District listed occasions when students received counseling for use of drugs or talked to counselors concerning drug usage. The circumstances and details surrounding these incidents do not appear to have been developed more fully with additional evidence, nor is there

[8] These are figures for the high school only. Figures for middle school participation were also included. In its response to interrogatories the District also listed various incidents involving sixth, seventh and eighth grade students and drugs. However, virtually all the evidence presented in this case through depositions related to the high school, where the plaintiffs were students. The district court's opinion likewise refers only to evidence involving the high school.

any indication that any of the students, at least at the high school level, were involved in extracurricular activities.

In its yearly application for funds under the Safe and Drug-Free Schools and Communities program, the District submitted a statement called an "analysis of current use." In the application for the 1995-96 year, the District stated, "[t]he use of the surveys have provided us with information concerning alcohol as our number one problem. Our students express that the main use is alcohol on the weekends. We have not found other types of illegal or controlled substances to be a major problem although they do exist." *Id.* at 806. Similarly, the 1996-97 application stated, "[t]he use of tobacco and alcohol continue to be our number one problems. Our students utilize that alcohol primarily on the weekends and use tobacco, especially smokeless tobacco, on a more regular basis. Other types of drugs including, controlled dangerous substances, are present but have not identified themselves as major problems at this time." *Id.* at 809. The application for the 1998-99 year contained a virtually identical statement. *Id.* at 813. Mr. Jacobs testified that the forms contained accurate information. Appellants' App. Vol. II at 366.

The District points to other instances of alleged drug usage to bolster its argument that there was a serious drug problem at the Tecumseh schools. Several of these instances occurred in the early 1970's. Many are based upon hearsay, or are virtually anecdotal. Except for the specific instances discussed above, none relate to students who are involved in the extracurricular activities to which the Policy applies.[9]

[9] For example, the District recites the following evidence of drug usage:

1. Fourteen instances of drug usage by District students known to the President of the District Board.

> 2. Injuries which have occurred to students and members of the public by District students engaged in Competitive Activities under the influence of drugs
>
> . . . .
>
> 6. Students enrolled in classes associated with Competitive Activities have been caught with or disciplined for drugs in the last four years.
>
> . . . .

Appellees' Brief in Chief at 5-6.

Some of these assertions involve distortions of the record in this case. For instance, the "fourteen instances of drug usage" known to Dean Rogers include the following: in 1970, her daughter told her that an unidentified boy on the school bus had offered her some pills, Appellants' App. Vol. II at 521; in 1978, one of her son's unidentified friends on the football team left a bag with drug paraphernalia in it at her house, *id.* in 1979, her son told her of "parties" he went to at which marijuana was smoked, Appellants' App. Vol. I at 127-28; in 1980, "[o]ne of the boys that ran with [her] son" was stopped and marijuana was found in his car, *id.* at 128-29; her daughter told her in 1972 or 1973 that the boyfriend of the girl with whom she shared a locker sold drugs, *id.* at 117; sometime in the middle 1980s a meter reader found some marijuana near the meter at what is now a junior high school, Appellants' App. Vol. II at 524; in the 1980s her grandson told her that an unidentified student had a marijuana cigarette at school, *id.* at 526; in the 1990s her grandson told her he attended a party and the girlfriend of a friend found her mother's marijuana and passed it around, *id.* at 527; the 1998 incident discussed above in which she overheard a boy in FFA invite other boys to a party at which "there would plenty of smokes," *id.* at 529; in the 1997-98 school year, her granddaughter told her that an unidentified boy "was bombed out and the teacher ask[ed] him if he was all right," *id.* at 530; in the 1997-98 year, a student not involved in any extracurricular activities was found to have marijuana in his car, *id.* at 5 51; the 1999 incident discussed above in which an FFA student was found with drug paraphernalia in his car. *Id.*

The reference to injuries to students and members of the public is to the incident in 1990 or 1991 when a steer got loose from a student under the influence of some substance, injuring himself and one other person. *Id.* at 476-77.

The record reference to the statement that "students enrolled in classes associated with Competitive Activities have been caught with or disciplined for drugs in the last four years" is a response to an interrogatory in

In sum, while there was clearly some drug use at the Tecumseh schools, such use among students subject to the testing Policy was negligible. It was vastly different from the epidemic of drug use and discipline problems among the very group subject to testing in *Vernonia*. With that in mind, we balance the privacy interests of the students against the District's interest in testing students pursuant to the Policy.

I. Nature of Privacy Interest

As in *Vernonia*, we first consider the "nature of the privacy interest upon which the search here at issue intrudes." *Vernonia*, 515 U.S. at 654. It is well established that, while students do not "shed their constitutional rights . . . at the schoolhouse gate," *Tinker v. Des Moines Indep. Cmty. Sch. Dist.*, 393 U.S. 503, 506 (1969), "students within the school environment have a lesser expectation of privacy than members of the population generally." *T.L.O.*, 469 U.S. at 348 (Powell, J., concurring). The Court in *Vernonia* found student athletes have an even lesser expectation of privacy than other students, both because of a perceived "'communal undress' inherent in athletic participation," *Vernonia*, 515 U.S. at 657 (quoting *Schaill v. Tippecanoe County Sch. Corp.*, 864 F.2d 1309, 1318 (1988)), and because athletes, simply by participating on the team, voluntarily subject themselves to increased supervision and additional obligations.

The District argues that participants in the extra-curricular activities subject to testing under the Policy, like athletes, have a reduced expectation of privacy because: (1) they voluntarily participate; (2) they occasionally travel out of

which the District stated that Principal Blue "can testify that students enrolled in FFA, FHA and Athletics have been caught with drugs or disciplined for drugs." Appellants' App. Vol. III at 738. As indicated above, however, Principal Blue actually testified that, of the three high school students who tested positive under the Policy, all three were athletes and two were involved in FFA.

town on trips where they must sleep together in communal settings and use communal bathrooms; and (3) they agree to abide by "the higher degree of academic and out-of-school rules and regulations of both the District and the OSSAA." Appellees' Brief in Chief at 17. While it is probably true that the degree of "communal undress" associated with most of the extracurricular activities in this case is different from the level of "communal undress" among athletes envisioned by the Supreme Court in *Vernonia*, we decline to give that difference, whatever it may be, much weight in our analysis. We doubt that the Court intends that the level of privacy expectation depends upon the degree to which particular students, or groups of students, dress or shower together or, on occasion, share sleeping or bathroom facilities while on occasional out-of-town trips.[10]

More significant tc us is the fact that, like athletes, students participating in other extracurricular activities voluntarily submit themselves to at least some additional requirements and obligations.[11] We examine first whether the voluntariness of the participation in the activity reduces a student's legitimate expectation of privacy while participating in that activity.

We do not believe that voluntary participation in an activity, without more, should reduce a student's, expectation of privacy in his or her body. Members of our society voluntarily engage in a variety of activities every day, and do not thereby suffer a reduction in their constitutional rights. As another court recently stated, "we disagree [with the view]

---

[10] Moreover, there was evidence in this case that not all athletes "shower[] and chang[e]" together after each event. *Vernonia*, 515 U.S. at 657. *See* Appellants' App. Vol. 11 at 380.

[11] The District Superintendent, Tom Wilsie, submitted an affidavit in which he stated that students wishing to participate in OSSAA sanctioned activities, like the extracurricular activities at issue in this case, "must meet scholastic standards in order to be eligible to participate." Wilsie Aff. at ¶ 5, Appellants' App. Vol. I at 78.

that just by exercising a privilege in any activity that is part of the educational process, a student's privacy interests are lessened and that a school district can, without more, condition participation in that activity on agreeing to testing just because the activities are optional." *Theodore v. Del. Valley Sch. Dist.*, 761 A.2d 652, 660 (Pa. Commw. Ct. 2000). Moreover, while participation in extracurricular activities is voluntary, such participation has become an integral part of the educational experience for most students. The Supreme Court recently cautioned against "minimiz[ing] the importance to many students of attending and participating in extracurricular activities as part of a complete educational experience." *Santa Fe Indep. Sch. Dist. v. Doe*, 120 S. Ct. 2266, 2280 (2000); *see also Trinidad Sch. Dist. No. 1 v. Lopez*, 963 P.2d 1095, 1109 (Colo. 1998) ("the reality for many students who wish to pursue post-secondary educational training and/or professional vocations requiring experience garnered only by participating in extracurricular activities is that they must engage in such activities . . . . [I]nvolvement in a school's extracurricular offerings is a vital adjunct to the educational experience."). Thus, the voluntariness of the participation, without more, does not reduce a student's expectation of privacy.

However, there are other aspects of participating in extracurricular activities which do legitimately lower a student's expectation of privacy. While students participating in non-athletic extracurricular activities need not obtain preparticipation physicals or insurance, as athletes must, they do, like athletes, agree to follow the directives and adhere to the rules set out by the coach or other director of the activity. This inevitably requires that their personal freedom to conduct themselves is, in some small way, constrained at least some of the time. We therefore conclude that, like athletes, participants in other extracurricular activities have a somewhat lesser privacy expectation than other students.

II. Character of Intrusion

We turn next to "the character of the intrusion that is complained of." *Vernonia*, 515 U.S. at 658. Because the manner of testing, the information obtained, and the use to which that information is put are, in this case, virtually identical to the testing process in *Vernonia*, we reach the same conclusion as did the Supreme Court: "the invasion of privacy was not significant." *Id.* at 660.

III. Nature and Immediacy of Concern and Efficacy of Solution

The final factor we consider is "the nature and immediacy of the governmental concern at issue here, and the efficacy of this means for meeting it." *Id.* This factor tips the balancing analysis decidedly in favor of the plaintiffs.

As the Court acknowledged in *Vernonia*, there can be no doubt that the District's interest in deterring drug use among students is very important, "perhaps compelling." *Id.* at 661. However, in addition to noting the general danger to children of drug abuse, the Court in *Vernonia* emphasized the particular danger to athletes caused by drug usage:

> the risk of immediate physical harm to the drug user or those with whom he is playing his sport is particularly high. Apart from psychological effects, which include impairment of judgment, slow reaction time, and a lessening of the perception of pain, the particular drugs screened by the District's Policy have been demonstrated to pose substantial physical risks to athletes.

Id. at 662. The District argues that students engaged in extracurricular activities are equally at risk of physical harm, both to themselves and others, because, for example, band members perform routines with heavy instruments and FFA members at times wrestle large animals. Furthermore, the District argues, participants in competitive extracurricular activities, like athletes, often practice or prepare for

competitions after school and on weekends, and travel on occasional overnight trips, where they are subject to less supervision than regular students.

This argument proves both too much and too little. While there may indeed be some extracurricular activities that involve a safety issue comparable to that of athletes, there are other students involved in extracurricular activities and therefore subject to the Policy who can hardly be considered a safety risk. It is difficult to imagine how participants in vocal choir, or the academic team, or even the FHA are in physical danger if they compete in those activities while using drugs, any more than any student is at risk simply from using drugs. On the other hand, there are students who are not subject to the testing Policy but who engage in activities in connection with school, such as working with shop equipment or laboratories, which involve a measurable safety risk. Thus, safety cannot be the sole justification for testing all students in competitive extracurricular activities, because the Policy, from a safety perspective, tests both too many students and too few. In essence, it too often simply tests the wrong students.[12]

Perhaps recognizing this dilemma, the District relies more heavily on the fact that all extracurricular students are subject to less supervision than students in classrooms when they are staying after school to meet and/or practice, and when they are traveling off campus to compete. However, if this provides the justification for testing, then again there is an imperfect match between the need to test and the group tested. Students who do not participate in any extracurricular activities are, at times, less supervised than they are in the

---

[12] To the extent one could argue that the safety issue here is the health. care risk of addiction or physical harm from the use of drugs, then the logical solution is to test all students. The fact that the District only tests a select group of students-those participating in extracurricular activities-indicates that its testing Policy is not motivated simply by health care concerns.

classroom-when they are in the hallways between classes, at lunch, immediately before and after school while they are entering and leaving school premises.

Moreover, Ms. Rogers testified that there are other student organizations and groups which take field trips, meet after school, and otherwise engage in precisely the same kinds of less supervised activities as those in the extracurricular activities subject to drug testing under the Policy. Appellants' App. Vol. II at 480-82, 560-61. The District admitted in a response to an interrogatory that other groups, not subject to the Policy, have traveled overnight. Appellants' App. Vol. III at 739. Accordingly, neither a concern for safety nor a concern about the degree of supervision provides a sufficient reason for testing the particular students whom the District chose to test under the Policy.

Additionally, given the paucity of evidence of an actual drug abuse problem among those subject to the Policy, the immediacy of the District's concern is greatly diminished. And, without a demonstrated drug abuse problem among the group being tested, the efficacy of the District's solution to its perceived problem is similarly greatly diminished. While the Court in *Vernonia* had no trouble identifying the efficacy of a drug testing policy for athletes when the athletes were at the heart of the drug problem, we see little efficacy in a drug testing policy which tests students among whom there is no measurable drug problem. *See Trinidad Sch. Dist. No. 1*, 963 P.2d at 1110 (holding that the school district failed to demonstrate the efficacy of its testing policy because it "swept within its reach students participating in an extracurricular activity who were not demonstrated to play a role in promoting drugs and for whom there was no demonstrated risk of physical injury").

In sum, applying the factors identified by the Supreme Court in *Vernonia*, we conclude that the testing Policy is

unconstitutional. We do not suggest that a school must wait until it can identify a drug abuse problem of epidemic proportions before it may drug test groups of its students. Nor do we declare any bright line mark concerning the magnitude at which a drug problem becomes severe enough to warrant a suspicionless drug testing policy. We leave that to each school district. However, any district seeking to impose a random suspicionless drug testing policy as a condition to participation in a school activity must demonstrate that there is some identifiable drug abuse problem among a sufficient number of those subject to the testing, such that testing that group of students will actually redress its drug problem.[13] "[S]pecial needs must rest on demonstrated realities." *United Teachers of New Orleans v. Orleans Parish Sch. Bd.*, 142 F.3d 853, 857 (5th Cir. 1998). Unless a district is required to demonstrate such a problem, there is no limit on what students a school may randomly and without suspicion test. Without any limitation, schools could test all of their students simply as a condition of attending school. The District admits it could not test its entire student body and we doubt very much that the Supreme Court would permit such broad testing were the issue presented to it.

---

[13] As the court in *Theodore* put it:

> While the purposes articulated set forth a governmental interest supporting a generalized drug and alcohol testing program, no reason is given for a special need to test only those students who engage in optional activities . . . more than the general student population. To carry out the health care a*nalogy, it would be as if the School* District was offering a polio vaccine only to those students engaged in extracurricular activities . . . without expressing a need as to why those students are more likely to contract polio or more likely to cause the spread of disease than any other selective group of students.

Theodore, 761 A.2d at 661.

In reaching this result, we realize that we are disagreeing with two of our fellow circuits.[14] However,

[14] In *Todd v. Rush County Schs.*, 133 F.3d 984 (7th Cir. 1998), the Seventh Circuit upheld the random suspicionless drug testing of high school students participating in extracurricular activities and driving to and from school. The court did so, however, with a scant and conclusory analysis: "we find that the reasoning compelling drug testing of athletes also applies to testing of students involved in extracurricular activities. Certainly successful extracurricular activities require healthy students." *Id.* at 986. The court also noted that participation in extracurricular activities is a privilege in which students have voluntarily chosen to participate. Rehearing en banc was denied, with written dissents by four judges. *Todd v. Rush County Schs.*, 139 F.3d 571 (7th Cir. 1998).

The Seventh Circuit then held unconstitutional a policy of drug testing any student who was suspended or violated specified rules in *Willis v. Anderson Comm. Sch. Corp.*, 158 F.3d 415 (7th Cir. 1998). Rather than making a conclusory determination, as in *Todd*, the *Willis* court carefully surveyed the Supreme Court case law and each factor set forth in *Vernonia*.

Most recently, in *Joy v. Penn-Harris Madison Sch. Corp.*, 212 F.3d 1052 (7th Cir. 2000), the Seventh Circuit again upheld the random suspicionless drug testing of students involved in extracurricular activities and driving to and from school, but it did so clearly only because it was bound under the doctrines of stare decisis and precedent to follow *Todd*. The court made it clear that, were it not so bound, it would find the policy unconstitutional under a careful and thorough application of the *Vernonia* factors.

The Eighth Circuit, in a decision subsequently vacated as moot, also upheld a suspicionless drug testing policy applicable to students participating in extracurricular activities. *Miller v. Wilkes*, 172 F.3d 574 (8th Cir. 1999). In applying the *Vernonia* factors, the court was untroubled by the fact that the school had presented no evidence of an actual drug problem. The court simply took judicial notice of the seriousness of drug and alcohol abuse in public schools.

By contrast, the Colorado Supreme Court held unconstitutional the suspicionless drug testing of all participants in the marching band. *Trinidad Sch. Dist. No. 1 v. Lopez*, 963 P.2d 1095 (Colo. 1998). After applying all the *Vernonia* factors, the court concluded that "the nature of

there are other courts with which we are in agreement. This issue is obviously a difficult one with which courts will continue to grapple.

CONCLUSION

For the foregoing reasons, we REVERSE and REMAND this matter to the district court for further proceedings consistent herewith.

the privacy interest invaded was different from that of the student athletes in *Vernonia*" and, although the district established it had a drug abuse problem, "the means chosen to deal with that problem were too broad." *Id.* at 1110; *see also Linke v. Northwestern Sch. Corp.*, 734 N.E. 2d 252 (Ind. Ct. App. 2000) (holding unconstitutional under the Indiana Constitution a suspicionless drug testing policy applicable to athletes and others involved in certain extracurricular activities); *Theodore v. Del. Valley Sch. Dist.*, 761 A.2d 652 (Pa. Commw. Ct. 2000) (holding unconstitutional a suspicionless drug testing policy applicable to those participating in extracurricular activities and driving to school).

Two district court cases within the Fifth Circuit have addressed this issue. In *Brooks v. East Chambers Consol. Indep. Sch. Dist.*, 730 F. Supp. 759 (S.D. Tex. 1989), *aff'd*, 930 F.2d 915 (5th Cir. 1991), a pre-*Vernonia* case, the court held unconstitutional suspicionless drug testing of students wishing to participate in extracurricular activities. The court held the testing was intrusive, there was no evidence of a drug problem or greater safety risk among those subject to the test, and the policy was "not likely to accomplish its ostensible goals." *Id.* at 765. The Fifth Circuit affirmed that decision without an opinion.

The Fifth Circuit will have an opportunity to revisit this issue, because another Texas district court has recently held unconstitutional the random suspicionless drug testing of all students participating in extracurricular activities. *Gardner v. Tulia Indep. Sch. Dist.*, No. 2:97-CV-020-J (N.D. Tex. filed Dec. 7, 2000). The school district has appealed the case to the Fifth Circuit. The court in *Gardner*, after noting that there was no evidence of a drug problem among students in general at the Tulia schools or among those participating in extracurricular activities and therefore subject to testing, held that *Vernonia* "was limited to random drug testing of the student athletes." Slip op. at 8; *see also Tannahill v. Lockney Indep. Sch. Dist.*, No. 5:00-CV-0073-C (N.D. Tex. filed March 1, 2001) (holding unconstitutional a drug testing policy applicable to all students).

EBEL, Circuit Judge, dissenting

I respectfully dissent from the panel's decision in this difficult case. Although I agree with many of the standards articulated by the majority in its opinion, I am unconvinced that the majority has actually followed those standards in reaching its final conclusion.

1. *Special Needs Analysis*

I agree with the majority that, under *Vernonia School District v. Acton,* 515 U.S. 646 (1995), a public school district need not demonstrate a particularized "special need" to randomly test students engaged in extracurricular activities for illegal drug use.[1] The "special needs" test, which is used in non-school settings to justify suspicionless searches, is dispensed with (or deemed satisfied) in a school setting because of the following, uniquely school-related considerations.

First, drugs are a particularly serious problem in our public schools, not just because of alarming rates of drug usage among school-age children,[2] but also both because young

[1] The *Vernonia* Court did not even discuss the special needs doctrine before moving ahead to the balancing portion of its analysis.

[2] One study indicates that, of children between the ages of twelve and seventeen, 18.7 percent report having used marijuana or hashish in their lifetimes. In addition, 2.4 percent report having used cocaine, 5.7 percent report having used hallucinogens, and 9.1 percent admit to having used inhalants. *See* Substance Abuse and Mental Health Services Administration, *1999 National Household Survey on Drug Abuse: Appendix G (Table G.7), available at http://www.samhsa.gov/oas/NHSDA/1999/Appendixg.htm* (last visited March 8, 2001). Furthermore, 10.9 percent of children age twelve to seventeen reported current (within thirty days of being interviewed) use of illegal drugs in 1999. *See* Substance Abuse and Mental Health Services Administration, *1999 National Household Survey on Drug Abuse: Chapter 2, National Estimates of Substance Abuse, available at*

people are especially susceptible to peer pressure encouraging the use of drugs and because of the especially virulent health damage caused by drug use among school-age children. *See Verno*515 U.S. at 661 ("School years are the time when the physical, psychological and addictive effects of drugs are most severe. 'Maturing nervous systems are more critically impaired by intoxicants than mature ones are; childhood losses in learning are lifelong and profound'; 'children grow chemically dependent more quickly than adults, and their record of recovery is depressingly poor.'" (citation omitted)).

Second, the Supreme Court in *New Jersey v. T.L.O.*, 469 U.S. 325 (1985), held that both search warrants and a requirement of probable cause are impractical in the school setting. *See* 469 U.S. at 340. Further, in *Vernonia* the Court went on to state that any suspicion-based testing changes the relationship between students and teachers from one of trust and cooperation to one of distrust and adversarial interactions. *See* 515 U.S. at 664 (noting that suspicionbased drug testing would "add[] to the ever-expanding diversionary duties of schoolteachers" by forcing them to "spot[] and bring[] to account drug abuse, a task for which they are ill prepared, and which is not readily compatible with their vocation").

http://www.samhsa.gov/oas/NHSDA/1999/Chapter2.htm (last visited March 8, 2001).

More alarming still are the statistics regarding first time drug use among children between the ages of twelve and seventeen. Of the 2.39 million people who reported having tried marijuana for the first time in 1998, 1.56 million were between the ages of twelve and seventeen. Of the 934,000 people who first used cocaine in 1998, 315,000 were between the ages of twelve and seventeen. *See* Substance Abuse and Mental Health Services Administration, *1999 National Household Survey on Drug Abuse: Appendix G (Tables G.49, G.50), available at http://www.samhsa.gov/oas/NHSDA/1999/Appendixg.htm* (last visited March 8, 2001).

Third, in the closed environment of a public school, drug use by some students interferes with the rights of other students to learn and grow in the educational environment. *See id.* at 662 ("[O]f course the effects of a drug infested school are visited not just upon the users, but upon the entire student body and faculty, as the educational process is disrupted."). Also, drug use may spread in such a setting, in a manner akin to other contagious diseases for which school districts have always had the authority to test and to control.

Fourth, and perhaps most important, is the Supreme Court's recognition in *Vernonia* that public schools vest in the State a responsibility to protect the children entrusted to its care from numerous social ills, including the use of illegal drugs. *See id.* ("[T]he necessity for the State to act is magnified by the fact that this evil is being visited not just upon individuals at large, but upon children for whom it has undertaken a special responsibility of care and direction."). In this regard, a school district has an almost *in loco parentis* relationship with its students, which vests in the school district special responsibilities for, and concomitant authority over, those children. *See id.* at 654-55.

Accordingly, I agree with the majority that the public school district in this case need not demonstrate, as a threshold matter, a special need to adopt the challenged drug testing Policy before we may proceed to the required *Vernonia* balancing analysis.[3] *Accord Miller v. Wilkes,* 172

[3] As one commentator has noted:

> [T]he Court's student search decisions [in *T.L.O.* and *Vernonia* establish constitutional standards that are explicitly tailored to take account of the school context. More importantly, the Court justified the standards and results as necessary to protect the educational process. The Court in both *T.L.O.* and *[Vernonia* thus upheld the searches not on the ground that maintaining order is an inherently important goal, but rather on the theory that some semblance of order is a necessary means to achieve the "primary" goal of schools: educating students.

James E. Ryan, *The Supreme Court and Public Schools,* 86 Va. L. Rev. 1335, 1363 (2000). Accordingly, "the Court has tailored the constitutional standards . . . to fit the school context, and it has generally done so in a way that lends more authority to the government (here, school officials) and less protection to individuals (here, students) than exists outside the school context." *Id. at* 1369.

F.3d 574, 578 (8th Cir. 1999) ("The Supreme Court has held that the public school environment provides the requisite 'special needs' so that a school district may dispense with those Fourth Amendment protections [of probable cause and warrants issued by a neutral magistrate]."), vacated as *moot,* 172 F.3d at 582.

Notwithstanding the majority's statement that no special need for random, suspicionless drug testing must be demonstrated by the school district in this case, the majority appears to reimpose a special needs requirement toward the end of its opinion.

The majority writes:

> [A]ny district seeking to impose a random suspicionless drug testing policy as a condition to participation in a school activity must demonstrate that there is some identifiable drug abuse problem among a sufficient number of those subject to testing, such that testing that group of students will actually redress its drug problem. "[S]pecial needs must rest on demonstrated realities."

See ante at 33 (quoting *United Teachers of New Orleans v. Orleans Parish Sch Bd.,* 142 F.3d 853, 857 (5th Cir. 1998)). This is similar to language used by another panel of this court in a case arising in a non-school setting, *19 Solid Waste Department Mechanics v. City of Albuquerque.*

156 F.3d 1068 (10th Cir. 1998) (*"19 Solid Waste Mechanics"*), where we discussed the special needs analysis that must take place when reviewing random, suspicionless drug testing of certain city employees. There, this court stated that the special needs test asks whether the drug testing policy "was adopted in response to a documented drug abuse problem or whether drug use among the target group would pose a serious danger to the public." *Id.* at 1073. That threshold inquiry is inappropriate in a school setting, however, where the majority has correctly observed that a showing of special need is unnecessary pursuant to the Supreme Court's holding in Vernonia.

I believe that requiring the school district in this case to make a threshold showing of special need, based upon proven drug use by a "sufficient number of those subject to testing," before it may implement a policy of random drug testing of students engaged in extracurricular activities mandates a more detailed demonstration than was ever required in either *Vernonia* or *19 Solid Waste Mechanics*.

In *Vernonia*, the Supreme Court held that the respondent school district had justified its policy of randomly testing student athletes for drug use even though there was little actual evidence in the record that those students tested were, in fact, the students most likely to use drugs. Despite the district court's rhetoric to the contrary, *see, e.g., Vernonia*, 515 U.S. at 662-63 (noting the district court's findings that "a large segment of the student body, particularly those involved in interscholastic athletics, was in a state of rebellion" and "that the rebellion was being fueled by alcohol and drug abuse as well as by the studen[s'] misperceptions about the drug culture"), the evidence in *Vernonia* of drug use by student athletes, or even by other students attending either the school in question or other schools in the respondent school district,

was quite limited. The evidence of drug use among student athletes was confined to the smell of marijuana detected on one road trip by the school wrestling coach, *see id.* at 679 (O'Connor, J., dissenting), one "severe sternum injury suffered by a wrestler, and various omissions of safety procedures and misexecutions by football players, all attributable in [an expert witness's] belief to the effects of drug use," *id.* at 649. Thus, there was no real demonstration in the *Vernonia* record, other than the one-time smell of marijuana and one expert's opinion, that the student athletes subject to the drug testing policy were frequent drug users or had exhibited a propensity toward drug use. The evidence of drug use among the student body in general was similarly attenuated, as it consisted of only: (1) a few instances of observed drug use by students; (2) student absenteeism in one peer group due to its desire to use drugs during the school day; (3) admissions by "several students" that they had used drugs; (4) one student's "obviously inebriated" appearance one day at school; and (5) one student's statement that he was "high on life" while dancing and singing in the back of a classroom. *See id.* at 679 (O'Connor, J., dissenting). Finally, in regard to the three grade schools subject to the drug testing policy,[4] there was "virtually no evidence in

[4] The respondent school district in *Vernonia* operated four schools: one high school and three grade schools. *See Vernonia*, 515 U.S. at 648. The three grade schools apparently encompassed the first through eighth grades, while the high school apparently encompassed the ninth through twelfth grades. *See id.* at 684 (O'Connor, J., dissenting). All students enrolled at the high school who engaged in student athletics were subject to the challenged drug testing policy. *See id.* at 685 (O'Connor, J., dissenting). As to the grade schools, it appears that only the seventh and eighth grade student athletes were subjected to the drug testing requirement. *See id.* at 684 (O'Connor, J., dissenting) (noting that the *Vernonia* opinion upholds drug testing of seventh and eighth graders enrolled at the grade schools). The named plaintiff in *Vernonia*, James

the record" of student drug use. *See id.* at 684 (O'Connor, J., dissenting). At one grade school, for example, the only evidence of drug use among the student body was an unsupported "'guarantee' by the . . . grade school principal that 'our problems we've had in '88 and '89 didn't start at the high school level. They started at the elementary school.'" *Id.* (O'Connor, J., dissenting) (concluding, "Perhaps there is a drug problem at the grade school, but one would not know it from this record").

Thus, on facts not much more compelling than those presented in this case, the Supreme Court found that the school district in *Vernonia* had justified its drug testing policy for all students who were enrolled in the seventh through twelfth grades in any school within the district and who were engaged in sports-related, voluntary extracurricular activities.

Furthermore, in the non-school case of *19 Solid Waste Mechanics,* we held that the district had established an adequate interest in testing mechanics employed by the city for drug use, even though it had not demonstrated any nexus between the employees subject to the test and any known drug problem. *See* 156 F.3d at 1074 (accepting the city's asserted rationale for adopting a mandatory drug testing program, *i.e.,* "public safety and employee health," even though there was absolutely no demonstrated history of drug use by the group subject to testing). To the extent that we accepted a public safety rationale to justify the drug testing policy in *19 Solid Waste Mechanics, see id.* (noting that the tested employees worked around potentially dangerous machines and repaired city vehicles that would later be "released back onto city streets"), the

---

Acton, was in the seventh grade when he initiated the lawsuit challenging the school district's drug testing requirement as it restricted his joining the Washington Grade School football team. See *id.* at 651.

asserted public safety concern in that case was certainly no more compelling or immediate than the safety and well-being of students enrolled in our public schools. And yet, despite the relative weakness of the city's "public safety and employee health" concerns, we held that an adequate justification for testing had been established in *19 Solid Waste Mechanics,* and we struck down the drug testing program only because the tested employees received advance notice of the tests, which were administered just once every four years, such that the drug testing "lack[ed] a real capacity to address drug use in the workplace." *Id.* Thus, it was the lack of efficacy in the solution, rather than the lack of a demonstrated drug problem or immediate public safety concern, that caused the drug testing policy to be invalidated in *19 Solid Waste Mechanics*.

Here, by reimposing a special needs requirement at the end of its opinion, and thereby requiring a school district to demonstrate an "identifiable drug abuse problem among a sufficient number of those subject to testing," the majority has both reneged on its earlier holding that a school district need not demonstrate a special need for random, suspicionless drug testing in the public school context and required more of the school district in this case than was ever required in either *Vernonia* or *19 Solid Waste Mechanics*.

For that reason, I must disagree with the majority's opinion on that issue.

2. *Balancing test*

I also disagree with the majority's ultimate application of *Vernonia*'s balancing test, by which the school district's Policy must be weighed. The *Vernonia* balancing test requires that we weigh the nature of the students' privacy interest and the character of the intrusion on that interest, on the one hand, against the nature and immediacy of the school district's concern and the efficacy of the proposed

solution, on the other hand. While I agree completely with the majority's discussion of several factors to be considered, and agree at least in part with its discussion of other factors, I nonetheless think the majority ultimately strikes the wrong balance.

a. *Nature of the Students' Privacy Interest and Character of the Intrusion*

The Supreme Court has stated that "students within the school environment have a lesser expectation of privacy than members of the population generally." *T.L.O.*, 469 U.S. at 348 (Powell, J., concurring). I agree with the majority that the privacy rights of the students subject to testing under the Policy in this case are further diminished, as compared to the privacy rights of students in general, due to the students' voluntary participation in extracurricular activities. *See ante* at 28 ("We therefore conclude that, like athletes, participants in other extracurricular activities have a somewhat lesser privacy expectation than other students."). Further, I agree with the majority that the character of the intrusion at issue in this case is "virtually identical to the testing process in *Vernoni* about which the Supreme Court stated: "the invasion of privacy [is] not significant."

I diverge with the majority only where, once again, I believe it has not actually followed the articulated conclusions and analysis it has set forth for itself.

Despite having reached the conclusion that the students subject to testing under the Policy have reduced privacy expectations and that the intrusion itself is "not significant," the majority nevertheless places what appears to be substantial weight upon those factors when performing the final balancing test under *Vernonia*. That is, while the majority denigrates the school district's interests to be weighed on the other side of the scale, and perhaps rightly so, the majority appears to forget its earlier conclusion that there is just not much for the school

district's interests to be weighed against. In my opinion, having determined both that the students' privacy expectations are diminished and that the intrusion itself is minimal, the majority may find that the "balancing analysis [tips] decidedly in favor of the plaintiffs," *see ante* at 29, only if the factors favoring drug testing, which must be weighed on the other side of the scale under *Vernonia* are truly insignificant. That is clearly not the case.

b. *Nature and Immediacy of the School District's Concern, and Efficacy of the Drug Testing Policy*

As the Supreme Court stated in *Vernonia*, "That the nature of the concern is important—indeed, perhaps compelling—can hardly be doubted." *See* 515 U.S. at 661. It is difficult to imagine an interest more compelling than stemming the tide of illegal drug use by young women and men before they subject themselves, and our society, to substantial risk and heartache. The public schools have an obligation to supervise and control the students under their care. *See* id. at 655 ("[A] proper educational environment requires close supervision of schoolchildren, as well as the enforcement of rules against conduct that would be perfectly permissible if undertaken by an adult.") (alteration in original). As noted by the *Vernonia* Court, this obligation imposes upon school officials a duty to protect the children under their care from evils that may befall them:

> While we do not, of course, suggest that public schools as a general matter have such a degree of control over children as to give rise to a constitutional duty to protect, we have acknowledged that for many purposes school authorities ac[t] *in loco parentis*, with the power and duty to inculcate the habits and manners of civility.

Id. (citations and quotations omitted) (alternation in original). Discouraging drug use among impressionable children is without question an integral part of a public school's duty to "inculcate the habits and manners of civility" in the students entrusted to their care.

The immediacy of the school district's concern is, as noted by the majority, the weakest part of the school district's case. In *Vernonia,* the Court gauged the immediacy of the respondent school district's concern by discussing what it characterized as a serious drug problem evidenced in the district in question. *See* 515 U.S. at 662-63 (noting that, based upon the district court's factual findings regarding drug use in the school district, there was "an immediate crisis" justifying random, suspicionless drug testing of student athletes). The majority in this case seems to have interpreted the immediacy discussion in *Vernonia* to state that a drug problem is not "immediate" if it has not reached "crisis" levels, as is evidenced by the majority's statement that a school district must demonstrate "some identifiable drug abuse problem among a sufficient number" of students before it may implement a random drug testing policy. I disagree. While it may be true that under *Vernonia* there can be no drug testing of students where there is no evidence of drug use by the student body, *Vernonia* does not require that a school district allow illegal drugs to gain a stronghold among its schoolchildren before it may take steps to eliminate them through random drug testing. Indeed, as discussed earlier, *see* discussion *supra* at 8-9, in *Vernonia* itself the actual evidence of drug use by students in the respondent school district did not demonstrate that the school district had been overtaken by a drug problem of overwhelming proportions. Illegal drugs extract a tremendous toll on their victims, and are nearly impossible to eliminate once they have garnered a foothold

in our communities, schools and homes.[5] To the extent that it is possible to prevent the irreparable harm attendant to illegal drug use through the diligent efforts of officials in our public schools, we should allow them to try.

Finally, in regard to the efficacy of the program, we have received briefs from *amicus curiae* presenting arguments on both sides of this issue. It is clear from these briefs that the efficacy of random, suspicionless drug testing in the public schools may legitimately be debated by knowledgeable sources. What is even more clear from this robust scholarly and practical debate, however, is that the efficacy question is not one that ought to be decided by members of the federal judiciary, who are so far removed from public school students and the officials who supervise them as to make their determinations speculative in the extreme. I would therefore defer to the judgment of local school boards, which are far better positioned (and more accountable) than federal judges to decide the type of drug testing policy that will best serve their need to protect children entrusted to their care.

I find this to be a difficult case, and acknowledge that the balancing of the *Vernonia* factors is far from easy. Given the weight that I believe is properly afforded to each factor set forth in *Vernonia,* however, I would find that the Policy survives the constitutional balancing test and should therefore be upheld.

3. *Other Issues*

There are a few more things that must be said of my decision to dissent from the majority opinion.

First, I believe the majority places too little weight on the fact that the testing here is limited to extracurricular activities, where the students have voluntarily submitted themselves to

---

[5] The intractability of drugs in our society is compellingly and realistically depicted in the film *Traffic* (USA Films 2000), a current Academy Award nominee for Best Motion Picture.

additional supervision and regulation. Participation in extracurricular activities is a privilege, not a right, *see Albach v. Odle,* 531 F.2d 983, 984-85 (10th Cir. 1976), and consequently schools are allowed to impose additional burdens on their participants, *see id. at* 985 (holding that the "supervision and regulation of high school athletic programs remain within the discretion of appropriate state boards"). *See also Todd v. Rush Count Schs.*, 133 F.3d 984, 986 (7th Cir. 1998). Additional conditions on student participation in extracurricular activities have often been upheld by this and other courts, and I see no reason why a drug test that we have deemed "not significant[ly]" invasive should be treated any differently. Furthermore, the extracurricular activities included within the purview of the challenged Policy involve travel and after-school activities where adult supervision is necessarily diminished as compared to the level of supervision involved in the average classroom. This reduced level of supervision in the context of extracurricular activities could well lead to the type of experimentation in drug use that this Policy is expressly designed to prevent.

The balancing might very well have come out differently if the drug testing Policy at issue in this case had been imposed upon the entire student body as a condition of enrollment in the respondent school district. *See* discussion *infra* at 20-21. In this case, however, the only students subject to testing are those who have chosen to engage in extracurricular activities which pose a potentially enhanced risk of drug abuse due to their decreased levels of supervision and which are privileges, not rights, to the affected students. In my view, this factor is insufficiently weighted by the majority in its opinion.

Second, the majority also errs, in my opinion, by arguing that the Policy is constitutionally suspect because it is both underinclusive and overinclusive. *See ante* at 30-31 (noting that the Policy "tests both too many students and too few" because it does not test all students who engage in travel or

potentially dangerous school-related activities, or all students involved in extracurricular activities that are difficult to supervise, but does test some extracurricular activity students who do not engage in travel or dangerous school-sponsored activities and who have no demonstrated history of, or propensity toward, drug abuse). It is true that not all students who travel as part of their extracurricular involvements are currently subjected to random drug testing under the Policy. Given the majority's concern about the Policy's constitutionality as it is currently formulated, however, it could hardly be considered "more" constitutional by the inclusion of more students into its testing scheme. In any event, we have never stated that a policy aimed at correcting a social ill need solve the entire problem in one fell swoop; in many cases it may be more prudent and efficacious to address social problems one step at a time, so that each step may be reviewed and adapted as necessary. *See Williamson v. Lee Optical of Oklahoma, Inc.,* 348 U.S. 483, 489 (1955) ("[T]he reform may take one step at a time, addressing itself to the phase of the problem which seems most acute to the legislative mind.").

I believe the majority's concern about overinclusiveness is similarly misplaced under the Supreme Court's decision in *Vernonia.* As previously discussed, despite the expansive language in the lower court opinion in *Vernonia,* the actual evidence in that case did not show that all student athletes subjected to random drug testing had demonstrated a significantly higher propensity for drug use than any other children in the district or, for that matter, than the students subjected to random drug testing in this case. Indeed, *Vernonia* upheld a policy of drug testing that included selected grade school students involved in athletics, even though there was essentially no evidence that the tested grade school children used drugs at all. Any argument that the Policy is overinclusive is thus limited by the Supreme Court's recognition that the policy in *Vernonia* passed constitutional

muster despite its testing of students who had no demonstrated history of drug abuse.

Although I do not disagree that issues of overinclusiveness or underinclusivenes are relevant inquiries, the majority seems to require a nearly perfect match between the problem and the solution, akin to the narrowly tailored requirement utilized in strict scrutiny analysis. This is not required under *Vernonia*. *See Vernonia*, 515 U.S. at 661-65 (applying a less rigorous five-factor balancing test rather than a strict scrutiny analysis). Here, we are dealing not with a fundamental right but with the conditions a school district constitutionally may impose upon students who voluntarily engage in a privileged activity. As such, there is no requirement that the school district prove the Policy is narrowly tailored before it may withstand constitutional scrutiny. *Accord Vernonia*, 515 U.S. at 663 (rejecting plaintiffs' argument that the school district must adopt the "least intrusive" means possible, *i.e.*, suspicion-based testing, to detect student drug use).

This is not to say that all public school students can or should be randomly tested for drug use. While the Supreme Court in *San Antonio Independent School District v. Rodriguez*, 411 U.S. 1, 37 (1973), held that education is not a fundamental right, it recognized in *Goss v. Lopez*, 419 U.S. 565, 574 (1975), that a student's entitlement to an elementary and secondary public education is a property interest which is constitutionally protected by the Due Process Clause. I agree with Justice Ginsburg's statement in concurrence in *Vernonia* that she understood the Court's opinion "as reserving the question whether the District, on no more than the showing made here, constitutionally could impose routine drug testing . . . on all students required to attend school." *See* 515 U.S. at 666 (Ginsburg, J., concurring). *Vernonia* allows drug testing only of those students who voluntarily engage in extra-curricular activities, and thereby agree to be bound by additional rules and regulations to which the average,

non-involved student need not adhere. In my view, a random, suspicionless drug testing policy that tested all public school students as a requirement of their continued attendance in the public schools would present a potentially intolerable burden on those students' right to a free public education and would likely run afoul of the Constitution. But that is decidedly not the case with which we are presented today.

Third, this type of search is quite dissimilar to the general searches, typically related to criminal proceedings, about which the Framers were most concerned when they drafted the Fourth Amendment. The cases and authorities cited by Justice O'Connor in her *Vernonia* dissent to support the argument that the Framers "most strongly opposed . . . general searches—that is, searches by general warrant, by writ of assistance, by broad statute, or by any other similar authority," *see* 515 U.S. at 669 (O'Connor, J., dissenting), deal primarily with searches conducted in the criminal context, and not with searches conducted as a condition precedent to engaging in a voluntary, discretionary activity which carries no criminal consequences. Indeed, Justice O'Connor noted that "several evenhanded blanket searches, including some that are more than minimally intrusive," have been upheld by the Supreme Court where the searches took place not in the criminal context but in closely regulated industries or, more important to this analysis, "in unique contexts such as prisons." *See id.* at 673 (O'Connor, J., dissenting). It is undeniably true that state officials have considerably greater latitude in a prison setting than in a public school setting. It is nevertheless also true that public schools, somewhat like prisons and other highly regulated settings, present supervisory officials with unique circumstances and responsibilities that necessarily result in diminished Fourth Amendment rights for the people entrusted to their care. *See id. at* 656 ("Fourth Amendment rights, no less than First and Fourteenth Amendment rights, are different in public schools than elsewhere; the 'reasonableness'

inquiry cannot disregard the schools' custodial and tutelary responsibility for children.").

Here, the information collected during the drug test is shared only with selected school officials on a need-to-know basis, and is never turned over to law enforcement officers or used to justify academic sanctions against students who test positive for illegal drug use. Further, if a student does not want to submit to a drug test, the school district cannot compel submission under the challenged Policy. Any student may refuse to submit to a drug test. The only consequence of that decision is the student's subsequent ineligibility to participate in a voluntary extracurricular activity because of his or her failure to satisfy one of the preconditions to participation in that activity.

Under these circumstances, where we are dealing with a population that has voluntarily subjected itself to testing and the test results are never used for criminal or disciplinary purposes, I do not believe the minimal privacy invasion involved presents the kind of general search that the Framers intended to prohibit when drafting the Fourth Amendment.

Fourth; I note, as does the majority, that the decision to strike down this Policy as unconstitutional creates a split among the federal circuit courts of appeals on an issue of substantial constitutional significance. In *Todd v. Rush County Schools*, 133 F.3d 984, 986-87 (7th Cir. 1998), the Seventh Circuit upheld against constitutional challenge a drug testing policy very similar to the policy at issue in this case. Rehearing en banc was denied in that case, despite the written dissents of four judges. *See Todd v. Rush County Schs.*, 139 F.3d 571 (7th Cir. 1998). It is true, as the majority states, *see ante* at 34 n.14, that the *Todd* decision was subsequently criticized by another panel of the Seventh Circuit. *See Joy v. Penn-Harris Madison Sch. Corp.*, 212 F.3d 1052 (7th Cir. 2000). However, the *Todd* decision nevertheless remains the law in the Seventh Circuit. The Eighth Circuit upheld a

similar drug testing policy in *Miller v. Wilkes*, 172 F.3d 574 (8th Cir. 1999), although that decision was later vacated as moot. The Fifth Circuit is likely to address this question soon, as a district court opinion invalidating a school district's random, suspicionless drug testing policy as it applied to students engaged in non-athletic extracurricular activities has apparently been appealed to that court. *See Gardner v. Tulia Indep. Sch. Dist.*, No. 2:97-CV-020-J, slip op. at 8 (N.D. Tex. Dec. 7, 2000) (stating that *Vernonia* "was limited to random drug testing of the student athletes").

For these reasons, I respectfully dissent and encourage the school district to seek an en banc rehearing by this court so that we may reconsider our decision. Failing that, perhaps the Supreme Court will grant a writ of certiorari to resolve the split among the circuits that we have today created on the important constitutional issue presented in this case.

APPENDIX B

UNITED STATES COURT OF APPEALS
FOR THE TENTH CIRCUIT

[Filed May 30, 2001]

No. 00-6128

JOHN DAVID EARLS, *et al.*,
Plaintiffs-Appellants,

v.

BOARD OF EDUCATION OF TECUMSEH PUBLIC SCHOOL DISTRICT, *et al.*,
Defendants-Appellees.

ORDER

Before BRORBY, ANDERSON and EBEL, Circuit Judges.

Appellees' petition for rehearing and suggestion for rehearing en banc is denied.

The petition for rehearing en banc was transmitted to all of the judges of the court who are in regular active service as required by Fed. R. App. P. 35.

Judge Ebel voted to grant rehearing.

Entered for the Court
PATRICK FISHER, Clerk of Court

By: /s/ Illegible
Deputy Clerk

APPENDIX C

UNITED STATES COURT OF APPEALS
TENTH CIRCUIT

[Filed July 3, 2001]

No. 00-6128

LINDSAY EARLS and LACEY EARLS, minors, by their next friends and parents, JOHN DAVID EARLS and LORI EARLS; DANIEL JAMES, a minor, by his friend and mother, LETA HAGAR,

Plaintiffs-Appellants,

v.

BOARD OF EDUCATION OF TECUMSEH PUBLIC SCHOOL DISTRICT, INDEPENDENT SCHOOL DISTRICT No. 92 of POTTAWATOMIE COUNTY; TECUMSEH PUBLIC SCHOOL DISTRICT, INDEPENDENT SCHOOL DISTRICT No. 92 of POTTAWATOMIE COUNTY,

Defendants - Appellees.

OKLAHOMA STATE SCHOOL BOARDS ASSOCIATION; NATIONAL SCHOOL BOARDS ASSOCIATION; WASHINGTON LEGAL FOUNDATION; U.S. SENATORS JUDD GREGG AND DON NICKLES; GOVERNOR FRANK KEATING; REP. FRED S. MORGAN (Oklahoma); OKLAHOMA SECONDARY SCHOOLS ACTIVITIES ASSOCIATION; ALLIED EDUCATIONAL FOUNDATION; GAYLA D. DUKE; RHONDA ELLARD; DEBRA FLETCHER; BOBBETTE HAMILTON; JIMMY AND SHEILA JORDAN; MICHAEL and KIM RAWLS; STEWART and ROSHEL STABEL; KENNETH A. STANLEY; KRIS STEELE; CLYDE L. and GAIL A. TOPPING; MIKE AND VALERIE TUCKER; STEVE and LYNNE YOUNG; THE AMERICAN PUBLIC HEALTH

ASSOCIATION; THE NATIONAL ASSOCIATION OF SOCIAL WORKERS; THE NATIONAL ASSOCIATION OF SOCIAL WORKERS-OKLAHOMA CHAPTER; THE CENTER FOR LAW AND EDUCATION; THE NATIONAL CENTER FOR YOUTH LAW; THE JUVENILE LAW CENTER; THE LOYOLA CHILDLAW CENTER; ADVOCATES FOR CHILDREN OF NEW YORK; LAWYERS FOR CHILDREN; COVENANT HOUSE NEW JERSEY; PROFESSOR MARTIN GUGGENHEIM & PROFESSOR RANDY HERTZ; AMERICAN ACADEMY OF PEDIATRICS,

Amici Curiae.

ORDER

Filed July 3, 2001

Before EBEL, ANDERSON and BRORBY, *Circuit Judges*.

This matter is before the panel on appellants' application pursuant to 42 U.S.C. § 1988(b) for appeal-related attorneys' fees, costs and expenses, together with appellants' separate application to tax costs on appeal pursuant to Fed. R. App. P. 39.

As to the application to tax costs pursuant to Fed. R. App. P. 39, appellees do not challenge the amount of $738.41 which appellants seek for photocopying expenses of appellants' briefs and appendix for the appeal. In light of this court's order of May 30, 200l, denying appellee's petition for rehearing with suggestion for rehearing en banc, we hereby grant appellants' application to tax costs on appeal in the amount of $738.41. *See* Fed. R. App. P. 39(c); *In re Penn Central Transp. Co.*, 630 F.2d 183, 191 (3d Cir. 1980).

With respect to the application for attorneys' fees, costs and expenses pursuant to 42 U.S.C. § 1988(b), appellees argue that any such award should reflect the fact that, in their view, appellants did not prevail on every issue. We disagree. By any rational evaluation of this case, appellants are prevailing parties. We hereby grant appellants' application for

appeal-related attorneys' fees, costs and expenses pursuant to 42 U.S.C. § 1988(b), and remand this matter to the district court for determination of the appropriate amount to be awarded.

ENTERED FOR THE COURT

Stephen H. Anderson
Circuit Judge

APPENDIX D

IN THE UNITED STATES DISTRICT COURT
FOR THE WESTERN DISTRICT
OF OKLAHOMA

[Filed Mar 9, 2000]

Case No. CIV-99-1213-R

LINDSAY EARLS, a minor, by her next friends and parents, JOHN DAVID EARLS and LORI EARLS; and DANIEL JAMES, by his next friend and mother, LETA HAGAR,

Plaintiffs,

vs.

BOARD OF EDUCATION of TECUMSEH PUBLIC SCHOOL DISTRICT, INDEPENDENT SCHOOL DISTRICT No. 92 of POTTAWATOMIE COUNTY, OKLAHOMA; and TECUMSEH PUBLIC SCHOOL DISTRICT, INDEPENDENT SCHOOL DISTRICT No. 92 of POTTAWATOMIE COUNTY, OKLAHOMA;

Defendants.

ORDER

Before the Court are the parties' cross-motions for summary judgment. Both sides seek summary judgment on the Plaintiffs' claims for declaratory and injunctive relief.

I. *Summary of the Evidence.*

The Plaintiffs, Lindsay Earls and Daniel James, are students at Tecumseh High School. The Defendants, Board of Education of Tecumseh Public School District and Tecumseh Public Schools, operate the school and establish and implement its policies. For many years, Tecumseh High School has offered a range of student activities, including choir, marching band, color guard, Future Farmers of

America and Future Homemakers of America, which were generally open to all students who wished to participate. The school has also offered various team sports and other activities to a limited number of students on a competitive basis. The vast majority of students participate in one or more school-sponsored activities. Plaintiff Lindsay Earls is a member of the show choir, the marching band and the academic team. Plaintiff Daniel James "seeks to participate" in the academic team in the 1999/2000 school year, and is enrolled in the academic team class.[1]

On September 14, 1998, the school district adopted the Student Activities Drug Testing Policy ("the Policy"), which requires all students who participate in extracurricular activities to submit to suspicionless drug testing. (See Plaintiff's Exhibit "O"). By its terms, the Policy requires that "any student that represents Tecumseh Schools in any extracurricular activity such as FFA [Future Farmers of

---

[1] The Defendants do not expressly contest either Plaintiffs standing to challenge the drug testing policy. However, the Court notes that the Defendants make allegations about Plaintiff Daniel James which call his standing into question. The Defendants' evidence indicates that Daniel James has been attending school in the District since March of 1998. He failed five academic subjects in the 1998/1999 school year, and failed the Academic Team class in the 1999/2000 school year, and was suspended from school in the 1998/1999 school year for a violation of District policy against carrying electronic pagers. Therefore, the Defendants contend, Daniel James is ineligible to participate in any interscholastic competition sanctioned by the OSSAA for this entire school year. The Plaintiffs argue that Daniel James' disciplinary suspension was unfair or unreasonable. There is some dispute as to whether the suspension was the cause of Mr. James' failing grades. The Plaintiffs contend that the suspension automatically caused Mr. James to fail his courses due to excessive absences, and the Defendants contend that the failures were unrelated to the suspension. The Court finds it unnecessary to resolve this dispute under the circumstances. Because there is no suggestion of lack of standing on the part of Plaintiff Lindsay Earls, the Court must reach the merits of the Plaintiffs' constitutional attack on the District's drug testing policy in any event.

America], FHA [Future Homemakers of America], Academic Team, Band, Vocal, Pom Pon, Cheerleader and Athletics," will be barred from participating in such activities unless the student submits a written consent to drug testing.[2] Students are required to undergo drug testing before participating, randomly during the year while participating, and at any time while participating in competitive activities upon reasonable suspicion. The test used by the District detects only amphetamines, cannabinoid metabolites (marijuana), cocaine, opiates, barbiturates and benzodiazepines.[3] A yearly fee of four dollars is charged for each student participating in the drug testing program.[4] It is conceded that the Policy has been applied, since its inception, only to those extra-curricular activities of a competitive nature.[5] The student Plaintiffs and

[2] See Plaintiffs' Exhibit "0." The original draft of the Policy covered only those students engaged in athletic competition. Prior to its adoption, however, the Policy was expanded to include "any extra-curricular activities."

[3] Upon reasonable suspicion, students may be tested for other substances identified in the Policy, including alcohol and anabolic steroids.

[4] The Defendants allege in their brief that the $4.00 fee is waived for students who cannot afford to pay it. In support of this assertion, the Defendants cite the deposition testimony of two teachers, Carolyn Daugherty and Danny Jacobs. Ms. Daugherty testified that she advised her students that if they had a problem with the fee, they should come to her and "they could work it out." (Deposition of Carolyn Daugherty, p. 70). Mr. Jacobs testified that he was sure that someone in the school administration or a faculty member or sponsor would cover the fee if necessary. (Deposition of Danny Jacobs, pp. 134-135). The Plaintiffs point out that the Defendants have not shown that the District has established an official policy of waiving the fee for underprivileged students. However, the Plaintiffs have not argued that the fee is unreasonable, or shown evidence that the fee has excluded any student from participating in extracurricular activities. Thus, the Court finds no constitutional deprivation arising out of the $4.00 annual fee.

[5] It is undisputed that the Policy has been applied only to those extracurricular activities which involve some aspect of competition, and

their parents challenge those provisions of the Policy which require suspicionless drug testing of students participating in non-athletic activities.[6]

II. *Reasonableness of the Policy.*

The state-compelled collection and testing of urine constitutes a "search" governed by Fourth Amendment principles of reasonableness. *Vernonia School District 47J v. Acton,* 515 U. S. 646 at 652-653, 115 S. Ct. 2386 at 2390, 132 L. Ed. 2d 564 (1995). Under the challenged Policy, the random acquisition and analysis of a urine sample is not supported by a warrant, probable cause, or individualized suspicion. As the Supreme Court has held, however, neither a warrant, nor probable cause, nor any measure of individualized suspicion is an indispensable component of reasonableness in every circumstance. *Vernonia, supra; National Treasury Employees Union v. Von Raab,* 489 U. S. 656, 665-668, 109 S. Ct. 1384, 103 L. Ed. 2d 685 (1989). Officials are permitted to dispense with the warrant and probable cause requirements where a Fourth Amendment intrusion serves special governmental needs, beyond the normal need for law enforcement. *Id.*

which are sanctioned by the Oklahoma Secondary Schools Activities Association ("OSSAA").

[6] The Plaintiffs do not challenge the Policy insofar as it applies to athletes, or insofar as it provides for drug testing upon reasonable, individualized suspicion. The Defendants point out that Plaintiff Daniel James is a member of Life Guides, a group sponsored by the Youth and Family Resource Center in Shawnee, Oklahoma, which has its own drug testing policy. The Court does not consider Mr. James' participation in Life Guides to have much bearing upon his objection to the School District's drug testing policy. First, Life Guides is not an official, school-sponsored organization, and second, the Life Guides drug testing program calls for suspicion-based testing. See Deposition of Daniel James, Defendants' Exhibit "J," pp. 141-142.

A. Existence of a Special Need.

The Supreme Court has historically found "special needs" to exist in the public school context, where the warrant requirement "would unduly interfere with the maintenance of the swift and informal disciplinary procedures [that are] needed," and "strict adherence to the requirement that searches be based upon probable cause" would undercut "the substantial need of teachers and administrators for freedom to maintain order in the schools." *Vernonia,* 515 U. S. at 653,115 S. Ct. at 2391, *citing New Jersey v. T. L. O.,* 469 U. S. 325,105 S. Ct. 733, 83 L. Ed. 2d 720 (1985).[7] In *Vernonia,* the Supreme Court found that a public school district had sufficiently demonstrated a special need justifying a similar drug testing policy.[8]

---

[7] The Supreme Court has also upheld suspicionless, warrantless searches and seizures to conduct drug testing of railroad personnel involved in train accidents, *see Skinner v. Railway Labor Executives' Association,* 489 U. S. 602, 109 S. Ct.1402,103 L. Ed. 2d 639 (1989); to conduct random drug testing of federal customs officers who carry arms or are involved in drug interdiction, *see National Treasury Employees Union v. Von Raab,* 489 U. S. 656,109 S. Ct. 1384, 103 L. Ed. 2d 685 (1989); and to maintain automobile checkpoints looking for illegal immigrants and contraband, and drunk drivers, *see United States v. Martinez-Fuerte,* 428 U. S. 543, 560 - 561, 96 S. Ct. 3074, 3084, 49 L. Ed. 2d 1116 (1976); *and Michigan Department of State Police v. Sitz,* 496 U. S. 444,110 S. Ct. 2481,110 L. Ed. 2d 412 (1990). In each of these cases, the Supreme Court balanced the intrusion on individuals' privacy interests against the promotion of legitimate governmental interests. Under that balancing equation, on one side, the Court examined the nature of the privacy interest upon which the search at issue intrudes and the character of the intrusion. *See Vernonia, supra.* On the other side, the Court considered the nature and immediacy of the governmental concern at issue, and the efficacy of the challenged test for meeting it. *Id. See also 19 Solid Waste Department Mechanics v.* City of *Albuquerque,* 156 F. 3d 1068, 1072 (10'h Cir. 1998).

[8] As explained more fully below, the Vernonia School District's policy was limited to student athletes, whereas the Policy challenged here applies to all students participating in competitive extracurricular activities.

The Plaintiffs argue that the Defendants have not made a similar showing of a "special need" beyond the need for normal law enforcement.[9] As the Plaintiffs point out, in approving the drug testing policy at issue *in Vernonia,* the Supreme Court stressed both the severity and the immediacy of the drug problem in the school district. The Court agreed with the district court's conclusion that "a large segment of the student body" was "in a state of rebellion," that disciplinary actions "had reached epidemic proportions," and that these problems were being "fueled by alcohol and drug abuse as well as by the students' misperceptions about the drug culture." 515 U. S. at 662-663,115 S. *Ct. at* 2395.[10]

---

[9] *See Vernonia, supra, quoting Grim v. Wisconsin,* 483 U. S. 868, 873,107 S. Ct. 3164, 3168, 97 L. Ed. 2d 87 (1987).

[10] The Supreme Court in *Vernonia* concurred with the trial court's finding that the school district's concerns were "immediate," citing evidence of rampant drug abuse and a "drug culture" within the student body. The evidence in that case indicated that a "large segment of the student body, particularly those involved in interscholastic athletics, was in a state of rebellion;" that disciplinary actions had reached "epidemic proportions," and that the "rebellion was being fueled by alcohol and drug abuse as well as the students' misperceptions about the drug culture." Teachers and administrators had observed a sharp increase in drug use. Students were beginning to speak out about their attraction to the drug culture, and to boast that there was nothing the school could do about it. Disciplinary referrals in the district had risen sharply, and several students had been suspended. School officials observed that students had become increasingly rude during class, and that outbursts of profanity had become common. 515 U. S. at 648-649,115 S. Ct. at 2388-2389. Not only were student athletes included among the drug users, but athletes were the leaders of the drug culture in that school. The Court cited evidence that drug use increases the risk of sports-related injury. One athletic coach had witnessed a severe sternum injury suffered by a wrestler, and various omissions of safety procedures and misexecutions by football players, all of which the coach attributed to the effects of drug use. The Court described the school administration as being "at its wits end," and noted that a large segment of the student body, particularly those involved in interscholastic athletics, was in a state of rebellion. The Court termed the

Although the *Vernonia Court* emphasized the severity of the drug problem in that school, this Court does not view the majority's holding in *Vernonia* to be limited to those circumstances where the drug problem is of such magnitude. The Supreme Court has found special governmental needs to justify suspicionless drug testing in other contexts, without first finding a pervasive drug problem among the group to be tested. *See, e. g., Skinner v. Railway Labor Executives' Assn,* 489 U. S. 602, 109 S. Ct.1402,103 L. Ed. 2d 639 (1989) (Upholding regulation requiring suspicionless drug testing of railroad employees involved in train crashes); *Von Raab,* 489 U. S. 656,109 S. Ct. 656, 103 L. Ed. 2d 685 (Sustaining a Customs Service program requiring drug tests as a condition of promotion or transfer to positions directly involving drug interdiction or requiring the employee to carry a firearm).[11] In these cases, the Court's findings of special need were not based upon any evidence of pervasive drug abuse among the groups to be tested; instead, the Court's findings were based on the fact that drug abuse by members of the targeted group presents special concerns. As the Supreme Court explained in *Vernonia,* illegal drug use by adolescent schoolchildren also presents special concerns.

The Plaintiffs' interpretation would mean that random drug testing of students by public school districts is not reasonable where illegal drug abuse by minor children is known to exist within a particular school unless the problem is shown to have reached epidemic proportions. This interpretation is plainly at odds with the Supreme Court's recognition of the

---

situation an "immediate crisis of greater proportions than existed in *Skinner,*" and "of much greater proportions than existed in *Von Raab.*" 515 U. S. 646 at 662-663,115 S. Ct. 2386, 2395.

[11] "*Cf. Chandler v. Miller,* 520 U. S. 305, 117 S. Ct. 1295, 137 L. Ed. 2d 513 (1997) (Striking Georgia's requirement that candidates for state office pass a drug test because it was not supported by a showing of special need).

heavy responsibility imposed upon school officials for the education, guidance and well-being of the minor children placed in their care, and the Court's recognition of the devastating effects of drug abuse by school children.

Admittedly the evidence in this case does not show an epidemic of illegal drug abuse in the Tecumseh School District. There is some evidence of student drug abuse dating back to the 1970's, which has continued to exist in more recent years. The school board president and three teachers testified on deposition that they had heard students speaking openly about using drugs in recent years.[12] Two teachers also testified that they had seen students who appeared to be under the influence of drugs.[13] Even the two student Plaintiffs have

---

[12] Dean Rogers, current president of the school board, testified that a girl had called her during the 1997-1998 school year, and told her that someone was passing a marijuana cigarette around in a classroom. (Defendants' Exhibit "C," p.145). Ms. Rogers testified that she once overheard a conversation in which a boy who was in the FFA invited some other boys to a party, telling the boys that he would have "plenty of smoke," which Ms. Rogers understood to mean marijuana. (Defendants' Exhibit "C," pp. 145-147). Ms. Rogers also testified that her granddaughter once told her that a boy was "bombed out," and that a teacher had asked the boy if he was all right. On one occasion a girl called Ms. Rogers to tell her that a marijuana cigarette was being passed around in a classroom. These incidents reportedly occurred during the 1997-1998 school term. Teacher Sheila Evans testified that she has been "amazed" to hear students in her classes speaking so freely about marijuana use. Ms. Evans testified that she has overheard students talking about the use of drugs in the last five years. Teacher Danny Sterling further testified that he had occasionally heard students openly talking about using drugs, and that these students showed no fear of being overheard by him. Defendants' Exhibit "I," pp. 78-79. Vocal music teacher and choir director Carolyn Daugherty testified that she has heard from students that other students were using drugs. (Deposition of Carolyn Daugherty, Plaintiffs' Exhibit "A," p. 45).

[13] Deposition of Carolyn Daugherty, Plaintiffs' Exhibit "A," pp. 45-47; deposition of Danny Sterling, Defendants' Exhibit "I," testimony of Danny Sterling, p. 78.

acknowledged that there is some drug abuse by Tecumseh High School students.[14] In recent years a drug dog has found marijuana cigarettes near the boundary of the school parking lot, and has alerted on a vehicle which contained "small particles and seeds of marijuana."[15] Police officers once found drugs or drug paraphernalia in a car driven by an FFA member."[16]

According to the School Board President, over the last two years, "people all over the community" were becoming more "aware" of the drug problem in the Tecumseh school."[17] In February 1998, a parent contacted the School Board President to discuss her concerns about drug use in the school. Later, this parent appeared at an open meeting of the School Board and openly discussed how drug use was affecting her son and his friends."[18] In the fall of 1998, "people were calling the [school] board members" to talk "about the drug situation."[19] Each of these situations arose

---

[14] Shortly after filing this lawsuit, Plaintiff Lindsay Earls appeared on a national television news program and stated that there is a widespread drug problem in the District. Later, in her deposition, Plaintiff Earls testified that she now does not know whether the drug problem in the District is widespread. See Defendants' Exhibit "G," testimony of Lindsay Earls, pp. 20-25, 26, 29). Plaintiff Daniel James testified on deposition that he has personally, physically observed "about twelve" students of Tecumseh High School under the influence of illegal drugs. Defendants' Exhibit "J," p. 234. Plaintiff James made this statement in response to a question about parties he had attended at which students seemed to be under the influence of drugs. He did not indicate that these twelve students had actually used drugs at school, nor did he suggest that they appeared to be under the influence at any official school function.

[15] Plaintiffs' Exhibit "E," Deposition of James Blue, pp. 38-41, 43,136.

[16] Defendants' Exhibit "C," pp. 170 -171.

[17] Defendants' Exhibit "C," p. 71.

[18] Defendants' Exhibit "C," pp. 78-79.

[19] Defendants' Exhibit "C," p. 78.

after the District had taken numerous other measures to discourage drug abuse by its students.[20]

In determining whether the Defendants have demonstrated a "special need" sufficient to justify suspicionless drug testing, the Court does not focus solely upon the evidence of actual use or possession of illegal drugs by students. Consistent with the Supreme Court's analysis in *Vernonia,* the Court considers not only this evidence, but such other factors as the cultural or social atmosphere in which students spoke openly of illegal drug use, even in the presence of teachers; phone calls to school board members from parents; and the public plea of a concerned mother who implored the school board to "do something" about the problem of drug use among the high school's students."[21]

The Plaintiffs cite several cases for the proposition that drug testing programs may be upheld under the special needs doctrine only when applied to individuals whose activities affect safety. *See, e. g., Bolden v. Southeast Pennsylvania Transportation Authority*, 953 F. 2d 807, 823 (3rd Cir.1991), *cert. denied,* 504 U. S. 943, 112 S. Ct. 2281, 119 L. Ed. 2d 206 (1992); *Laverpool v. New York City* Transit Authority, 835 F. Supp.1440,1455 (E. D. N. Y.1993), *aff'd*, 41 F. 3d 1501(2nd Cir.1994); *Plane v. United States*, 750 F. Supp.

---

[20] Prior to adopting the drug testing policy, the District had implemented several educational programs and security measures designed to deter drug use. The District actively observes "Red Ribbon week" each school year, during which anti-drug rallies are held and students are urged to pledge to remain drug-free. The school also uses "victim impact" speakers, and a program referred to as the "Grim Reaper" program. The school uses drug dogs to search school property, has been provided with a city police officer to patrol the high school, and has installed surveillance cameras. (Defendants' Exhibit "I," Defendant's Exhibit "J," pp. 54-57).

[21] The Court finds the fact that some sixteen parents have joined in an *amicus curiae* brief in favor of the drug testing policy to be some indication of parental support for the Policy.

1358, 1369 (W. D. Mich. 1990); *Burka v. New York City* Transit Authority, 739 F. Supp. 814, 822 (S. D. N. Y. 1990); and *Gonzalez v. Metropolitan Transportation Authority,* 174 F. 3d 1016 (9th Cir. 1999). Each of these cases involved adults challenging mandatory drug testing in the employment context. Together, these cases establish that certain jobs carry a diminished expectation of privacy because their duties carry a substantial threat to safety. As explained in *Gonzalez, supra,* children committed to the temporary custody of the state as schoolmaster also have a substantially diminished expectation of privacy as compared to adults, simply because of their protected status.[22]

The Plaintiffs attempt to refute the Defendants' evidence with statements made by school officials in the School District's annual applications for funding from the Safe and Drug Free Schools and Communities program over the years.[23] The statements, contained in each of several

[22] The Court further observes that of the Plaintiffs' cases cited above, all except Gonzalez were decided before the Supreme Court addressed the issue of drug testing in public schools in *Vernonia,* 515 U. S. 646, 115 S. Ct. 2386, 132 L. Ed. 2d 564 (1995).

[23] The Plaintiffs cite isolated comments contained in an application the District submitted in prior years to the state Department of Education under the Drug Free Schools and Communities Act of 1986. In these applications, school officials wrote: "The use of tobacco and alcohol continue to be our number one problem. Our students utilize alcohol primarily on the weekends and use tobacco, especially smokeless tobacco, on a more regular basis. Other types of drugs, including controlled dangerous substances, are present but have not identified themselves as major problems at this time." (Plaintiffs' Exhibit "B," pp. 291, 303, 344). In context, it appears that the author meant that drugs were not believed to be a "major" problem as compared to alcohol and tobacco. Even the Plaintiffs' interpretation would not warrant a different result. Despite the rather optimistic assurance that drugs were not a "major" problem, the District has amply demonstrated that the possession and use of illegal drugs, and an atmosphere of apparent acceptance of drug use by students were sufficiently serious problems to warrant a finding of "special need."

applications, indicate that although controlled substances were "present" within the school, illegal drug use was "not a major problem at this time." These statements are inherently subjective and imprecise, and in no way refute the Defendants' evidence that there was a drug problem at the school at the time the Policy was adopted. In fact, although these statements optimistically portray the drug problem as "not major," they acknowledge that the problem did exist. Viewing the evidence as a whole, it cannot be reasonably disputed that the Defendant School District was faced with a "drug problem" when it adopted the Policy." [24]

While the evidence in this case does not show a drug problem of epidemic proportions, or a student body in a state of rebellion, it certainly shows legitimate cause for concern. This Court is well aware of the prevalence of illegal drugs in our society, including our schools. The undersigned has observed, far too frequently, the devastating effects of illegal drug use, not only upon the users, but upon the countless others whose lives are touched. The Supreme Court has observed that drug abuse among public school students causes discipline problems, inattentiveness, and an atmosphere of disruption in the classroom. In such an environment, the mission of the school is thwarted, to the detriment of both the drug-impaired pupils and the innocent. Illegal drugs are known to cause overall health problems for users, and to pose serious safety risks for others. As the Supreme Court emphasized in *Vernonia, supra*, the school years are the time when the physical, psychological and

[24] *See Todd v. Rush County Schools,* 133 F. 3d 984 (7th Cir.), *cert. denied,* 119 S. Ct. 68,142 L. Ed. 2d 53 (1998), in which the Seventh Circuit upheld a drug testing policy in a school district which presented some evidence of drug use by students, but clearly did not show that student drug abuse had reached epidemic proportions, or that the student body was in a state of rebellion. The evidence is more fully outlined in the district court opinion. *See Todd v. Rush County Schools,* 983 F. Supp. 799 (S. D. Ind. 1997).

addictive effects of drugs are most severe. Maturing nervous systems are even more critically impaired by intoxicants than mature ones are, and childhood losses in learning are lifelong and profound. Children grow chemically dependent more quickly than adults, and their record of recovery is depressingly poor. The effects of a drug-infested school are visited not just upon the users, but upon the entire student body and faculty, as the educational process is disrupted. Citing these facts, the Supreme Court has recognized that the importance of deterring drug use by all this nation's schoolchildren "can hardly be doubted." *Vernonia,* 515 U. S. 646, 661, 115 S. Ct. 2386, 2395. It would seem rather anomalous to require school officials to await an epidemic before taking peremptory measures. Having considered all of these factors, the Court finds that the Defendants have demonstrated a "special need" sufficient to justify the random drug testing policy at issue here.

B. Nature of the Privacy Interest Involved.

As established in *Vernonia,* the first factor to be considered in determining the reasonableness of a search is the nature of the privacy interest on which it intrudes. 515 U. S. at 654, 115 S. Ct. at 2391. The *Vernonia* Court noted that the subjects of the school district's drug testing policy were minor children who had been committed to the temporary custody of the state as schoolmaster. In that capacity, the Supreme Court explained, the state may exercise a degree of supervision and control greater than it could exercise over free adults. *Id.*[25] The Court explained that because public school children are required to submit to physical examinations and be vaccinated, they have a lesser privacy

[25] Fourth Amendment rights, no less than First and Fourteenth Amendment rights, are different in public schools than elsewhere; the 'reasonableness' inquiry cannot disregard the schools' custodial and tutelary responsibility for children." *Vernonia,* 515 U. S. 646 at 655, 115 S. Ct. 2386 at 2392.

expectation with regard to medical examinations and procedures than the general population.[26] Student athletes have even less of a legitimate privacy expectation, because an element of communal undress is inherent in athletic participation, and because athletes are subject to preseason physical exams and rules regulating their conduct. 515 U. S. at 657, 115 S. Ct. at 2391-2393.[27] Thus, in the context of public school students, particularly student athletes, the expectation of privacy is significantly reduced.

The Plaintiffs challenge the Policy at issue here on the ground that it is not limited to student athletes, as was the challenged policy in *Vernonia,* but includes all students participating in any extra-curricular activities of a competitive nature.[28] The Plaintiffs argue that, unlike athletes, their

[26] The Court pointed out: "For their own good and that of their classmates, public school children are routinely required to submit to various physical examinations, and to be vaccinated against various diseases. According to the American Academy of Pediatrics, most public schools provide vision and hearing screening and dental and dermatological checks. . . . Others also mandate scoliosis screening at appropriate grade levels. . . . Particularly with regard to medical examinations and procedures, therefore, students within the public school environment have a lesser expectation of privacy than members of the population generally." *Vernonia,* 515 U. S. at 655, 115 S. Ct. at 2392, citations omitted.

[27] The Court stated: "School sports are not for the bashful. They require 'suiting up' before each practice or event, and showering and changing afterwards. Public school locker rooms, the usual sites for these activities, are not notable for the privacy they afford." 515 U. S. at 657, 115 S. C. at 2393.

[28] The Plaintiffs point out that the Tecumseh Policy, by its terms, is not limited to those extracurricular activities of a competitive nature. Rather, the written Policy states that it applies to "member[s] of any middle school or high school Tecumseh Public School District sponsored extra-curricular organization." The Policy further provides: "This includes any student that represents Tecumseh Schools in any extra-curricular activity

privacy expectations have not been lowered beyond those of ordinary students by virtue of their participation in extracurricular activities.

It is true that in *Vernonia,* the Supreme Court stressed that the school district's policy was directed narrowly to drug use by athletes, where the risk of immediate physical harm to the user and other players is particularly high,"[29] and further observed that the school district's drug problem was particularly acute among its athletes. However, this Court does not read *Vernonia* as limiting a public school district's authority to conduct drug searches to student athletes. The Supreme Court did say that "[l]egitimate privacy expectations are even less with regard to student athletes." 515 U. S. at 657, 115 S. Ct. at 2392. That is not to say, however, that among public school students it is only athletes whose legitimate expectation of privacy is so diminished that a search such as this one can withstand constitutional *scrutiny.*

---

such as FFA, FHA, Academic Team,, Band, Vocal, Pom Pon, Cheerleader, and Athletics." (Exhibit "0" at p. 2).

[29] The Court stated, in *Vernonia*:

> "Apart from psychological effects, which include impairment of judgment, slow reaction time, and a lessening of the perception of pain, the particular drugs screened by the District's Policy have been demonstrated to pose substantial physical risks to athletes. Amphetamines produce an 'artificially induced heart rate increase, peripheral vasoconstriction, blood pressure increase, and masking of the normal fatigue response,' making them a 'very dangerous drug when used during exercise of any type.' . . . . Marijuana causes 'irregular blood pressure responses during changes in body position,' 'reduction in the oxygen-carrying capacity of the blood,' and 'inhibition of the normal sweating responses resulting in increased body temperature.' . . . . Cocaine produces 'vasoconstriction, elevated blood pressure,' and 'possible coronary artery spasms and myocardial infarction.' "

515 U. S. at 662, 115 S. Ct. at 2395.

See Miller v Wilkes, 172 F. 3d 574 (8th Cir.1999);[30] *Todd v. Rush County Schools,* 133 F.3d 984 (7th Cir.) (Approving a drug testing policy which included all students participating in "extracurricular activities," including athletic teams, the student council, foreign language clubs, Fellowship of Christian Athletes, Future Farmers of America officers and the library *club), cert. denied,* 119 S. Ct. 68, 142 L. Ed. 2d 53 (1998). The *Vernonia Court* observed that simply being a student in a public school is "central" to a lowered expectation of privacy.[31]

Granted, student athletes are more likely than other students to disrobe and shower in locker rooms notorious for their lack of privacy. Student athletes also undergo routine preseason physical exams which are presumably not required of students participating in non-athletic activities. Nevertheless, as with athletics, there are features of non-athletic, extracurricular school activities that will lower the privacy expectation of those who opt to participate to a point below that of fellow students. *Miller v. Wilkes, supra.*"[32] Although they may not be as rigorous as those relating to student athletic programs, extracurricular clubs and activities,

---

[30] The Court notes that the panel opinion *in Miller v. Wilkes, supra,* was vacated by order dated June 15, 1999. In that order, the court found that appellant Miller was no longer a student in the appellee school district, and vacated both the district court's judgment and the judgment on appeal as moot. The court further denied the appellant's petition for rehearing en banc as moot.

[31] The Supreme Court in *Vernonia* cautioned against the assumption that suspicionless drug testing will readily pass constitutional muster in other contexts. 515 U. S. at 665. The Court explained: "The most significant element in this case is the first we discussed: that the Policy was undertaken in furtherance of the government's responsibilities, under a public school system, as guardian and tutor of children entrusted to its care." Id. Hence, it was the drug testing policy's application to students attending public school, not its exclusive application to student athletes, which the Court found to be central to its analysis. *Id.* at 654.

[32] See footnote 32 supra.

particularly those of a competitive nature, will have their own rules and requirements for participating students that do not apply to the student body as a whole. For example, each of the competitive activities to which the Policy has been applied is subject to the rules of the Oklahoma Secondary Schools Athletic Association ("OSSAA").[33] As with team sports, a faculty sponsor will monitor the students for compliance with the various rules that the clubs and activities dictate. Thus, students who elect to be involved in school activities have a legitimate expectation of privacy that is diminished to a level below that of the already lowered expectation of non-participating students.[34] The Court rejects the Plaintiffs' argument that the Defendant's drug testing policy is unreasonable because it includes non-athletes.

C. Character of the Intrusion.

The Court next addresses the character of the intrusion imposed by the District's drug testing policy. This analysis is informed at the outset by Supreme Court precedent establishing that minor children in the public school setting have a substantially lower expectation of privacy than do

[33] OSSAA rules require, among other things, that participating students maintain minimum standards of scholastic eligibility, i.e., that they not have a failing grade in any class during the semester in which they are participating, and that they have not failed a certain number of classes in the preceding semester. The Plaintiffs maintain that the OSSAA eligibility rules are applied quite broadly, so that a number of student groups not covered by the Policy are nevertheless subject to OSSAA rules.

[34] The Defendants also point to evidence that on some occasions, students participating in non-athletic activities compromise their privacy in ways comparable to that of athletes. For example, students competing in nonathletic activities travel out of town and out of state more frequently than the general student population. On these occasions, students sometimes sleep together in a dormitory setting, or share motel rooms. They may also share communal restroom facilities. (Deposition of Lindsay Earls, Defendants' Exhibit "G," pp. 37-45).

ordinary citizens. *Vernonia*, 515 U. S. at 656, 115 S. Ct. at 2392-2393. The nature of the student Plaintiffs' constitutional rights is what is appropriate for children in school. The essence of a public school's authority over children "is custodial and tutelary, permitting a degree of supervision and control that could not be exercised over free adults," and the "reasonableness inquiry" cannot ignore this fact of life.

As the Supreme Court explained in *Vernonia*, although collecting samples of urine intrudes upon "an excretory function traditionally shielded by great privacy," the degree of intrusion depends upon the manner in which production of the urine sample is monitored. 515 U. S. at 658, 115 S. Ct. 2393, *citing Skinner*, 489 U. S. at 626, 109 S. Ct. at 1418, 103 L. Ed. 2d 639 (1989).

When drug testing is conducted at the Tecumseh schools, the students to be tested are called out of class in groups of two or three. The students are directed to a restroom, where a faculty member serves as a monitor.[35] The monitor waits

[35] The Policy provides, in part:

> "All aspects of the drug use testing program, including the taking of specimens, will be conducted so as to safeguard the personal and privacy rights of the student to the maximum degree possible. The test specimen shall be obtained in a manner designed to minimize intrusiveness of the procedure. In particular, the specimen must be collected in a restroomn or other private facility behind a closed stall. The principal/athletic director shall designate a coach or school employee of the same sex as the student to accompany the student to a restroom or other private facility behind a closed stall. The monitor shall not observe the student while the specimen is being produced, but the monitor shall be present outside the stall to listen for the normal sounds of urination in order to guard against tampered specimens and to insure an accurate chain of custody. The monitor shall verify the normal warmth and appearance of the specimen."

See also Deposition of Danny Jacobs, Plaintiffs' Exhibit "B," pp. 180-82; Deposition of Grant Gower, Plaintiffs' Exhibit "F," pp. 44-46; Deposition of James Blue, Plaintiffs' Exhibit "E," pp. 79, 88.

outside the closed restroom stall for the student to produce the sample.[36] The monitor pours the contents of the vial into two bottles. Together, the faculty monitor and the student seal the bottles. The student is given a form to sign, which is placed, along with the filled bottles, into a mailing pouch in the presence of the student. Random drug testing was conducted in this manner on approximately eight occasions during the 1998/1999 school year. Approximately twenty students were tested each time.[37] Although some students have expressed embarrassment over the drug testing procedure,[38] it is the same basic procedure described *in Vernonia* as "nearly identical to those typically encountered in public restrooms, which men, women, and especially schoolchildren use

[36] "Under the Tecumseh drug testing policy, both male and female students produce their samples in the privacy of a closed restroom stall. In *Vernonia,* male students produced their sample standing at a urinal.

[37] Deposition of Grant Gower, Plaintiffs' Exhibit "E," pp. 44-46.

[38] (Deposition of Carolyn Daugherty, Plaintiffs' Exhibit "A," p. 94). According to Ms. Daugherty, approximately ten percent of her students have complained about the drug testing procedure. Four students have dropped the choir class since the Policy was implemented, one of whom told Ms. Daugherty that she was dropping the class because of the drug testing policy. (*Id.* at p. 95). Grant Gower testified that some students gave sideways looks to each other, and giggled and snickered during the testing procedure. (Deposition of Grant Gower, Plaintiffs' Exhibit "E," pp. 46-47). Plaintiff Lindsay Earls testified: "It's just kind of embarrassing for someone to be standing outside your stall listening to you while you use the restroom. It was kind of embarrassing." (Deposition of Lindsay Earls, pp. 91-92). Plaintiff Earls testified that one faculty member, the sponsor of the cheerleading squad, joked to her that she felt she was engaging in potty training. (*Id.* at 92). Plaintiff James testified that he considers being asked to provide a urine sample in order to participate in competitive activities to be disrespectful and humiliating. Mr. James does not necessarily object to providing a urine sample for his job at K-Mart or for Life Guides, which is not a school sponsored activity. (Deposition of Daniel James, Defendants' Exhibit "J," pp. 141-142).

daily.[39] 39 515 U. S. at 658,115 S. Ct. at 2393. The Supreme Court has characterized the privacy interests compromised by the process of collecting such urine samples as "negligible." *Id.*

The other privacy-invasive aspect of urinalysis is, of course, the information it discloses concerning the state of the subject's health, and the materials the subject has ingested. *Vernonia*, 515 U. S. at 658, 115 S. Ct. at 2393. As in *Vernonia,* the tests in question are designed to reveal only the presence of certain standard drugs, not medical conditions, and do not vary according to the identity of the student. The Policy provides that test results will be kept in confidential files separate from the students' other educational records, will be released only to those school personnel who "have a need to know," and will not be turned over to law enforcement authorities. 115 S. Ct. at 2393-2394. (Policy, Plaintiffs' Exhibit "O," p. 5). Test results are not used for any internal disciplinary function. (*Id.*).[40]

[39] The Plaintiffs argue that providing a urine sample under the Policy is more intrusive than the ordinary process of using a public restroom. Under the Policy, students providing a urine sample must urinate into a cup while a faculty member waits outside the stall, listening for the "normal sounds" of urination. The student must then hand the cup to the faculty member, who checks it for warmth, color and clarity while the student watches. (Plaintiffs' Exhibit "O"). Obviously, one does not usually encounter these particular intrusions when using a public restroom. Nevertheless, the procedure is otherwise the same as that encountered in a typical public restroom. The procedure used in Tecumseh is identical to that described with approval by the Supreme Court in *Vernonia,* except that in Tecumseh, both male and female students are afforded the privacy of a closed stall. The Court finds that the procedure employed by the Defendants for collecting urine samples is not unduly intrusive.

[40] The Tecumseh Policy does provide for students who test positive for drugs to participate in counseling sessions, and for repeat offenders to be excluded from participation in extracurricular activities. Test results are

The Plaintiffs allege that students who refuse to consent to testing under the Policy may suffer disciplinary measures or academic consequences. Although the Policy expressly provides that no academic sanctions will be imposed for violations,[41] the Plaintiffs contend that school officials have failed to ensure that teachers know and follow the "no sanction" provision. The Plaintiffs offer no evidence of any students actually suffering such disciplinary or academic consequences from refusing to consent to drug testing. At most, the Plaintiffs' evidence suggests that there was, in the beginning, some degree of confusion among some students and some faculty members as to whether a refusal to consent would affect a student's standing or enrollment in a competition-related class.[42] Nevertheless, it is clear that the

---

not, however, used to subject students to disciplinary detention, suspension or expulsion from school, or any other internal disciplinary function.

[41] The Policy provides:

> "The sanctions imposed for violations of this policy will be limitations solely upon limiting the opportunity of any student determined to be in violation of this policy to a student's privilege to participate in extracurricular activities. No suspensions from school or academic sanctions will be imposed for violations of this policy."

Plaintiffs' Exhibit "O," p. 1.

[42] Apparently, students who participate in an extracurricular activity usually enroll in a corresponding course for academic credit. For example, student members of the Future Farmers of America enroll in an agriculture course, and that members of the school choir enroll in a vocal music class. The Plaintiffs contend that the Policy has been applied in a manner which has led students to believe that refusal to consent to drug testing will affect their class enrollment and their grades in these classes. At the meeting in which the Policy was explained to faculty members, school board member Danny Jacobs advised the faculty that any student who refused to participate in the drug testing program would remain in the class, and that there would be no academic sanction. (Plaintiffs' Exhibit "B," pp. 316-317). High School Principal James Blue acknowledged in his deposition testimony that at least one faculty member incorrectly

District's official policy, and actual practice, has been to allow students refusing to consent to drug testing to remain in the corresponding class. These students are permitted, and required, to participate in classroom activities for graded classroom work, as are all students who are ineligible for interscholastic competition.[43]

The Plaintiffs have also offered evidence that some faculty members give extra credit to students who compete in certain activities.[44] However, there is no evidence that students who refuse to consent to drug testing are treated any differently with regard to extra credit than any other non-competitors, or

---

assumed that students who sign up for the competition classes intend to compete. Plaintiffs' Exhibit "E," pp. 145-146. However, Mr. Blue explained that there are a number of reasons why a student enrolled in a competition-related class may not actually compete. For example, a student who has enrolled in a class may simply decide not to compete, or may not be selected for the team. (Plaintiffs' Exhibit "E"). Whereas enrollment in "competition" classes is generally available to students who sign up, membership on a team is not guaranteed based on class enrollment. As an example, Mr. Blue testified that there are currently 16 students enrolled in the academic team class, of whom only four will be chosen as starting members of the competition team. (Plaintiffs' Exhibit "E"). Presumably, a student enrolled in a competition-related class might also become unable to compete because of injury, illness, or other personal circumstances. These students, like those who refuse drug testing, are nevertheless permitted to remain in the class without being penalized.

[43] See Affidavit of Nancy Warwick, Defendants' Exhibit "J."

[44] Teacher Danny Sterling testified on deposition that students enrolled in his agriculture classes can earn extra credit, and thus improve their grades, by competing in livestock shows. (Deposition of Danny Sterling, Plaintiffs' Exhibit "H," pp. 13-14). Mr. Sterling further testified that teachers "strongly encourage" all agriculture students to be members of the FFA, and to compete in the FFA shows so that they can apply what they have learned in the agriculture class. Deposition of Danny Sterling, pp. 28-30.

that any students' grades have been lowered because of their refusal to consent to drug testing.[45]

The Plaintiffs maintain that the Policy provides no protection against a student's positive drug test results becoming known to the school's general population, and allege that one student's positive test is already "widely known among students." The Plaintiffs surmise that a student could, hypothetically, reveal his own test results, or that his test results could become public knowledge by virtue of his sudden withdrawal from competitive activities shortly after being tested. The Court concludes that neither the unspecified allegation that one student's test results have become "widely known," nor speculation that future test results could become known, demonstrates an undue privacy invasion.[46] The Policy expressly provides for confidentiality of test results, and the Court must assume that the confidentiality provisions will be honored.

The Plaintiffs complain that the term "need to know" is not defined in the Policy, and that the District has, in practice, decided that athletic coaches and activity sponsors have a "need to know" that one of their students has tested positive.

---

[45] Mr. Sterling testified that participating in livestock competitions "can just only help the grade, not hurt it." Sterling deposition, pp. 13-14.

[46] Obviously, a student who reveals his own test results thereby waives any privacy interest he may claim in that regard, and is hardly in a position to complain of the lack of confidentiality. *See, e. g, Doe v. City of New York,* 15 F. 3d 264 (2nd Cir. 1994); *Fraternal Order of Police Lodge No. 5 v. City* of *Philadelphia,* 812 F. 2d 105,111(3rd Cir.1987) (right to privacy can be waived). A student who divulges his test results to his classmates has no reasonable expectation of keeping those test results private. Furthermore, although it seems obvious that no confidentiality provision could prevent high school students from gossiping or from guessing, correctly or incorrectly, that a classmate who withdraws from extracurricular activities has failed a drug test, the Tecumseh policy includes confidentiality provisions similar to those approved by the Supreme Court in *Vernonia.*

Vernonia specifically approved of the procedure of disclosing test results to a limited class of school personnel who have a need to know. The Court finds the term to be self-explanatory, and finds no fault with the School District's decision to treat the coaches and sponsors of the activities affected as having a need to know. It is inherently reasonable to advise an athletic coach or activity sponsor of the reason why a student under his or her tutelage has been declared ineligible to practice or compete.

Next, the Plaintiffs argue that the District's procedure for collecting prescription drug information is unreasonably intrusive. The Plaintiffs complain that when consent forms were being collected, the choir teacher "looked at students' list[s] of prescription drugs and left the lists where other students could see them." (Plaintiffs' Brief in Opposition to Defendants' Summary Judgment Motion). The Plaintiffs further allege that during the testing process, students were again required to list all of their prescription drugs on a form reviewed by at least one teacher or coach, as well as the principal or athletic director.

The deposition testimony cited by the Plaintiffs in support of this proposition indicates that the teacher or coach to whom the form was submitted reviewed each consent form to make sure they included a parent's signature, the student's signature, and the requested medical information.[47] The Supreme *Court in Vernonia* found that a similar provision, requiring students to identify in advance prescription medication they were taking, "raise[d] some cause for concern." 515 U. S. 646, 659, 115 S. Ct. 2386, 2394. "On the other hand," the Court reasoned, "we have never indicated that requiring advance disclosure of medications is per se unreasonable." *Id.* The Court reasoned:

---

[47] Testimony of Carolyn Daugherty, Plaintiffs' Exhibit "A," p. 84.

> "It may well be that, if and when [a student] was selected for random testing at a time that he was taking medication, the School District would have permitted him to provide the requested information in a confidential manner—for example, in a sealed envelope delivered to the testing lab. Nothing in the Policy contradicts that, and when respondents choose, in effect, to challenge the Policy on its face, we will not assume the worst. Accordingly, we [conclude] that the invasion of privacy was not significant."

515 U. S. at 660, 115 S. Ct. at 2394.

The Tecumseh Policy contains an express provision for confidentiality of prescription drug information. The Tecumseh Policy provides:

> "The monitor shall give each student a form on which the student may list any medications legally prescribed for the student, he or she has taken in the preceding thirty (30) days. The parent or legal guardian shall be able to confirm the medication list submitted by their child during the twenty-four (24) hours following any drug test. The medication list shall be submitted to the lab in a sealed and confidential envelope and shall not be viewed by district employees."

Plaintiffs' Exhibit "O," p. 5. Thus, to the extent that the Tecumseh Policy provides for disclosure of prescription drug information at the time of testing, it expressly provides for the level of confidentiality of prescription drug information contemplated by the Supreme Court in *Vernonia*.

The Plaintiffs offer evidence that, in practice, the District has not always adhered to the strict confidentiality provisions of the Policy. For example, the choir teacher testified on deposition that some students submitted lists of prescription drugs along with their consent forms, prior to the start of

testing.[48] The choir teacher admitted that she read some of the lists, and that she placed them in a folder or envelope which she may have occasionally left, closed but unsealed, on a table in the choir room.[49] Admittedly this practice represents a departure from the strict confidentiality provisions of the Policy. However, the Plaintiffs have not shown that the choir teacher's actions resulted in any actual disclosure of private medical information to fellow students.[50] The Court also finds it significant that the choir teacher testified that because she travels with her students off school premises, her students have been supplying her with prescription drug and other medical information long before the Policy was implemented.[51]

---

[48] Deposition of Carolyn Daugherty, Plaintiffs' Exhibit "A," p. 81. Ms. Daugherty testified that students were only required to turn in the first page of the consent form, and were not required to turn in the second page, consisting of a prescription drug list.

[49] Deposition of Carolyn Daugherty, Plaintiffs' Exhibit "A," p. 82. Ms. Daugherty explained that she normally kept the folder or envelope in her office and closed the door, and that she tried to be very careful to safeguard it because it also contained money.

[50] The Plaintiffs have not shown that either the choir teacher or anyone else read their prescription drug lists, or even that they submitted such lists. Nor have the Plaintiffs shown that any students whose lists the choir teacher reviewed objected to this, or that the folder containing the forms was ever disturbed.

[51] Ms. Daugherty testified that she has generated her own form for obtaining medical information she considers pertinent from her students. Ms. Daugherty's form requires students to divulge any prescription drugs they are using, their insurance information and the name of an emergency contact person. Ms. Daugherty has been collecting this information from her students throughout her 29 years of teaching for reasons unrelated to the drug testing policy. She carries these forms with her when traveling with students on overnight trips, and has had occasion to use the information in a hospital emergency room. (Defendants' Exhibit "H," pp. 90-94).

The Plaintiffs also offer evidence that during the testing process, students handed their "forms" to the faculty monitor when they entered the restroom stall. However, it is not clear from the deposition testimony cited whether the "forms" referred to included prescription drug information or other information of a private nature. Nor does the evidence cited indicate whether the faculty monitors read the information contained on the forms, or whether students were allowed to place their forms in a sealed envelope. In the absence of any evidence of an actual breach of privacy, the Court will not assume the worst. Under the circumstances, the Court finds that the invasion of privacy was not significant. *Accord, Vernonia*, 515 U. S. at 660,115 S. Ct. at 23 94, *citing Skinner, supra*.

D. Effectiveness of the Policy.

The next factor to consider in weighing the reasonableness of the Policy is its effectiveness to address the special governmental need in question. *See, e.g., 19 Solid Waste Mechanics v. City of Albuquerque*, 156 F. 3 d 1068, 1074 (10th Cir. 1998). Addressing the efficacy of drug testing as a response to the severe drug problem in *Vernonia,* the Court noted that: "it seems . . . self-evident that a drug problem largely fueled by the 'role model' effect of athletes' drug use, and of particular danger to athletes, is effectively addressed by making sure that athletes do not use drugs." The Defendants offer evidence that, like student athletes, the student members of the other competitive groups are held in high esteem by their peers, and tend to be regarded as leaders and role models. The Plaintiffs deny that they are student leaders or role models, and further assert that students participating in extracurricular activities are among the least likely to use drugs.

The Court need not resolve the dispute over whether members of the targeted group, i.e., students participating in competitive extracurricular activities, are regarded as role

models. Nor will the Court speculate as to whether these students are more likely than others to abuse illegal drugs. The Supreme Court's holding in *Vernonia* does not require a school district to isolate those students most likely to use drugs.[52] Although the Supreme Court cited evidence that the drug problem in that school was particularly acute among athletes, the Court did not suggest that a school drug testing policy should target those most likely to use drugs, or exclude those deemed least likely to use drugs.[53] It can scarcely be disputed that the drug problem among the student body is effectively addressed by making sure that the large number of students participating in competitive, extracurricular activities do not use drugs.

The Court rejects the Plaintiffs' contention that only suspicion-based drug testing would be reasonable within the meaning of the Fourth Amendment. The Supreme Court has repeatedly refused to declare that only the least intrusive search practicable can be reasonable under the Fourth Amendment. *Vernonia*, 515 U. S. at 663, 115 S. Ct. at 2396; *Skinner*, 489 U. S. at 629, n. 9, 109 S. Ct. at 1420, n. 9. As the Supreme Court explained in *Vernonia,* the alternative of testing all students only upon suspicion is fraught with difficulties. "It may be impracticable, for one thing, simply because the parents who are willing to accept random drug testing [for students engaged in extracurricular activities] are

---

[52] Similarly, the drug testing regulation upheld in *Skinner* made no attempt to isolate those railroad employees most likely to use illegal drugs. Nor did the drug testing policy in Von Raab isolate those customs employees deemed most likely to use illegal drugs.

[53] In this Court's view, any attempt to do either would raise serious concerns. A policy attempting to draw such distinctions would be subject to challenge as arbitrary, and would unfairly brand some students as "drug-prone." Drug testing under a policy target at the drug prone would undoubtedly carry a social stigma and inherent indignity unknown to students tested under a policy of random testing of those participating in certain extracurricular activities.

not willing to accept accusatory drug testing for all students, which transforms the process into a badge of shame." 515 U. S. at 663, 115 S. Ct. at 2396. Suspicion-based drug testing brings the risk that teachers would impose testing arbitrarily upon troublesome but not drug-likely students. It generates the risk of defending lawsuits charging arbitrary imposition of drug testing, or that demand greater process before accusatory drug testing is imposed. It would also impose upon school teachers and coaches the new function of spotting drug users, which is not readily compatible with their vocation. *Id.*

III. *Conclusion.*

Upon careful consideration of the evidence presented by both sides, the Court concludes that the Defendants have adequately demonstrated a special need to justify the warrantless, suspicionless drug testing at issue here. The Court finds that the privacy interest asserted is diminished by virtue of the Plaintiffs' position as children in a public school testing, and that the intrusion is minimal. The Court further finds that the policy is effective to address the special governmental need asserted. Accordingly, the Court concludes that the drug testing policy constitutes a reasonable search, permissible under the Fourth Amendment.

The Defendants' Motion for Summary Judgment is hereby GRANTED. The Plaintiffs' Motion for Summary Judgment is hereby DENIED.

IT IS SO ORDERED this 9th day of March, 2000.

/s/ David L. Russell
DAVID L. RUSSELL
Chief United States District Judge

APPENDIX E

IN THE UNITED STATES DISTRICT COURT
FOR THE WESTERN DISTRICT
OF OKLAHOMA

[Filed Mar. 9, 2000]

Case No. CIV-99-1213-R

LINSDAY EARLS, a minor, by her neat friends and parents, JOHN DAVID EARLS and LORI EARLS; and DANIEL JAMES, by his next friend and mother, LETA HAGAR,

Plaintiffs,

vs.

BOARD OF EDUCATION OF TECUMSEH PUBLIC SCHOOL DISTRICT, Independent School District No. 92 of Pottawatomie County, Oklahoma; and TECUMSEH PUBLIC SCHOOL DISTRICT, Independent School District No. 92 of Pottawatomie County, Oklahoma;

Defendants.

JUDGMENT

Judgment is hereby entered in favor of the Defendants, Board of Education of Tecumseh Public School District, Independent School District No. 92 of Pottawatomie County, Oklahoma, Tecumseh Public School District, Independent School District No. 92 of Pottawatomie County, Oklahoma, and against the Plaintiffs, Lindsay Earls, a minor, by her next friends and parents, John David Earls and Lori Earls; and Daniel James, by his next friend and mother, Leta Hagar.

IT IS SO ORDERED this 9th day of March, 2000.

/s/ David L. Russell
DAVID L. RUSSELL
Chief United States District Judge

APPENDIX F

IN THE UNITED STATES DISTRICT COURT
FOR THE WESTERN DISTRICT
OF OKLAHOMA

[Filed Mar. 24, 2000]

CIV-99-1213-R

LINDSAY EARLS, a minor, by her next friends and parents, John David and Lori Earls, and DANIEL JAMES, a minor, by his next friend and mother, Leta Hagar, and LACEY EARLS, a minor, by her next friend and parents, John David and Lori Earls,

Plaintiffs,

v.

BOARD OF EDUCATION OF TECUMSEH PUBLIC SCHOOL DISTRICT, Independent School District No. 92 of Pottawatomie County, and TECUMSEH PUBLIC SCHOOL DISTRICT, Independent School District No. 92 of Pottawatomie County,

Defendants.

AMENDED JUDGMENT

Judgment is hereby entered in favor of Defendants, Board of Education of Tecumseh Public School District, Independent School District No. 92 of Pottawatomie County, Oklahoma, Tecumseh Public School District, Independent School District No. 92 of Pottawatomie County, Oklahoma, and against the Plaintiffs, Lindsay Earls, a minor, by her next friends and parents, John David and Lori Earls; Daniel James, a minor, by his next friend and mother, Leta Hagar; and Lacey Earls, a minor, by her next friends and parents, John David and Lori Earls.

IT IS SO ORDERED this 24th day of March, 2000.

/s/ David L. Russell
DAVID L. RUSSELL
CHIEF UNITED STATES DISTRICT JUDGE